No. 02-371-CSY Title: Virginia, Petitioner
v.
Kevin Lamont Hicks

Docketed: September 9, 2002 Court: Supreme Court of Virginia

Entry	Date	Proceedings and Orders
	Sep 5 2002	Petition for writ of certiorari filed. (Response due October 9, 2002)
	Oct 7 2002	Waiver of right of respondent Kevin Lamont Hicks to respond filed.
	Oct 9 2002	Motion of City of Richmond and Richmond Develop. & Housing Authority for leave to file a brief as amici curiae filed.
	Oct 16 2002	DISTRIBUTED for Conference of November 1, 2002
	Oct 22 2002	Response requested.
	Nov 21 2002	Brief of respondent Kevin Lamont Hicks in opposition filed.
	Nov 21 2002	Motion of respondent for leave to proceed in forma pauperis filed.
	Dec 4 2002	REDISTRIBUTED for Conference of January 10, 2003
	Dec 4 2002	Reply brief of petitioner Virginia filed.
	Jan 13 2003	REDISTRIBUTED for Conference of January 17, 2003
	Jan 21 2003	REDISTRIBUTED for Conference of January 24, 2003
	Jan 24 2003	Motion of City of Richmond and Richmond Develop. & Housing Authority for leave to file a brief as amici curiae GRANTED.
	Jan 24 2003	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Jan 24 2003	Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 7, 2003. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, April 4, 2003. A reply brief, if any, is to filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, April 23, 2003. Rule 29.2 does not apply. SET FOR ARGUMENT April 30, 2003. **********
	Mar 6 2003	LODGING consisting of twenty enlarged copies of the street plan for Whitcomb Court that appears in the Joint Appendix received from counsel for the petitioner.
	Mar 7 2003	Brief of petitioner Virginia filed.
	Mar 7 2003	Brief of Criminal Justice Legal Foundation filed.
	Mar 7 2003	Brief amici curiae of Alabama, et al. filed.
	Mar 7 2003	Brief amici curiae of City of Richmond and Richmond Develop.and Housing Authority filed.
	Mar 7 2003	Brief amicus curiae of United States filed.
	Mar 7 2003	Joint appendix filed.
	Mar 7 2003	Brief amici curiae of National League of Cities, et al. filed.
	Mar 7 2003	Brief amici curiae of Council of Large Public Housing Authorities, et al. filed.
	Mar 11 2003	CIRCULATED.

2pp

No. 02-371-CSY

Entry	Date	Proceedings and Orders
	Mar 21 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Apr 4 2003	Brief of respondent Kevin Lamont Hicks filed.
	Apr 4 2003	Brief amici curiae of Richmond Tenants Organization, et al. filed.
	Apr 4 2003	Brief amici curiae of ACLU, et al. filed.
	Apr 4 2003	Brief amicus curiae of Watchtower Bible and Tract Society of New York, Inc. filed.
	Apr 4 2003	Brief amicus curiae of DKT Liberty Project filed.
	Apr 11 2003	LODGING consisting of 11 copies of a map of Richmond, Virginia received from counsel for the respondent and distributed.
	Apr 18 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Apr 22 2003	Record filed.
	Apr 23 2003	Reply brief of petitioner Virginia filed.
	Apr 23 2003	Letter from counsel for the petitioner and affidavit received and distributed.
	Apr 24 2003	Record filed.
	Apr 30 2003	ARGUED.

Supreme Court, U.S.
FILED

No. 02 371 SEP -5 2002

OFFICE OF THE CLERK

In The
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

KEVIN LAMONT HICKS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Virginia

PETITION FOR WRIT OF CERTIORARI

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146 pp

QUESTIONS PRESENTED

1. May a criminal defendant escape conviction by invoking the overbreadth doctrine even though (i) his own offense did not involve any expressive conduct, and (ii) his conduct was not proscribed by that portion of the government statute, regulation or policy he challenges as overbroad?

2. In the context of government's attempts to exclude some non-residents from a public housing complex, does the Constitution recognize a distinction between actions taken by government as landlord and actions taken by government as sovereign?

LIST OF PARTIES

The petitioner is the Commonwealth of Virginia. The respondent is Kevin Lamont Hicks, who was convicted for trespass, under Virginia Code § 18.2-119, for returning to the property of a public housing project after being notified not to do so.

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PETITION FOR WRIT OF CERTIORARI

The Commonwealth of Virginia respectfully petitions this Court for a writ of *certiorari* to review the judgment of the Supreme Court of Virginia, which held that the trespass policy of the Richmond Redevelopment and Housing Authority ("the Housing Authority") violates the First Amendment.

OPINIONS BELOW

The Supreme Court of Virginia held that the trespass policy of the Housing Authority is overly broad and thus unconstitutional. On this basis, it affirmed the judgment by which the Court of Appeals of Virginia, sitting *en banc*, reversed the trespass conviction of the respondent, Kevin Lamont Hicks. The decision by the Supreme Court of Virginia is published as *Virginia v. Hicks*, 563 S.E.2d 674 (Va. 2002), and is reprinted in the Appendix at App. 1. The *en banc* opinion of the Court of Appeals of Virginia is published as *Hicks v. Virginia,* 548 S.E.2d 249 (Va. App. 2001). It is reprinted at App. 28. The overruled panel opinion of the Court of Appeals of Virginia, affirming the convictions of Hicks, is published as *Hicks v. Virginia*, 535 S.E.2d 678 (Va. App. 2000). It is reprinted at App. 59. The record of the ruling whereby the Circuit Court of the City of Richmond denied Hicks' motion to dismiss is found at App. 90.

JURISDICTION

The opinion of the Supreme Court of Virginia was entered on June 7, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

1. The First Amendment to the Constitution of the United States provides that "Congress shall make no law . . . abridging the freedom of speech . . . . "

2. The Fourteenth Amendment provides that " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . . "

3. The trespass statute implicated here, Virginia Code § 18.2-119, provides in pertinent part:

> Trespass after having been forbidden to do so; penalties. – If any person without authority of law goes upon or remains upon the lands, buildings or premises of another, or any portion or area thereof, after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian or other person lawfully in charge thereof, or after having been forbidden to do so by a sign or signs posted by such persons ... on such lands, buildings, premises or portion of area thereof at a place or places where it or they may be reasonably seen . . . he shall be guilty of a Class 1 misdemeanor.

4. A copy of the ordinance by which the City of Richmond closed streets running through the Whitcomb Court housing project and transferred them to the Housing Authority is found at App. 93.

5. The Housing Authority trespass policy provides, in pertinent part:

> Richmond Redevelopment and Housing Authority hereby authorizes each and every sworn officer of the Richmond Police Department to enforce the trespass laws of the Commonwealth of Virginia as stated in Virginia Code § 18.2-119 upon Richmond Redevelopment and Housing Authority public housing property. . . . Richmond Redevelopment and Housing Authority further authorizes each and every Richmond Police Department officer to serve notice, either orally or in writing, to any person who is found on Richmond Redevelopment and Housing Authority property when such person is not a resident, employee, or such person cannot demonstrate a legitimate business or social purpose for being on the premises. Such notice shall forbid the person from returning to the property. Finally, Richmond Redevelopment and Housing Authority authorizes Richmond Police Department officers to arrest any person for trespassing after such person, having been duly notified, either stays upon or returns to Richmond Redevelopment and Housing Authority property.

App. 98.

STATEMENT OF THE CASE

> ***"[D]rug dealers are increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants.***
>
> ***"[T]he increase in drug-related and violent crime not only leads to murders, muggings, and other forms of violence against tenants, but also to a deterioration of the physical environment that requires substantial government expenditures."***

42 U.S.C. § 11901(3) and (4) (Congressional findings) (quoted in *Department of Housing and Urban Development v. Rucker*, 122 S. Ct. 1230, 1232, 1235 (2002)).

Before the events giving rise to this case, Whitcomb Court was likewise described as "an open air drug market." App. 3. A public housing project in Richmond, Virginia, Whitcomb Court suffered from the same crime epidemic that has plagued many housing projects across the country. The root of the problem was not the people living there, but those who came from the outside. *See* App. 3.

Determined to provide greater protection to the residents of Whitcomb Court, the City of Richmond passed an ordinance, in June of 1997, declaring that the streets inside the housing project were "no longer needed for the public convenience" and closing them to public use and travel. App. 93, 97 (plat).[1] The City then deeded the streets to the Richmond Redevelopment and Housing Authority ("the Housing Authority"), a government entity that owns and operates this project. App. 3. The sidewalks that run adjacent to these streets were conveyed as part of the same transaction.

---

[1] The purposes of this action were explained in a brochure provided by the Housing Authority to residents of Whitcomb Court:

> To make communities safer by removing persons who commit unlawful acts which destroy the peaceful enjoyment of other residents.
>
> To ensure that children have places to play free of drug paraphernalia and the danger of gunshots and other criminal activity.
>
> To provide an opportunity for residents to develop safety initiatives in their community, such as resident patrols, social security number property identification, neighborhood watch, etc.
>
> To hold households who knowingly harbor persons who engage in criminal activity accountable.

App. 104-05.

The deed required the Housing Authority to give notice that it was now the owner, by "mak[ing] provisions to give the appearance that the closed streets, particularly at the entrances, are no longer public streets and that they are in fact private streets." App. 3, 4. The Housing Authority erected signs every 100 feet along the streets of Whitcomb Court, and affixed them to the apartment buildings. The clearly visible red and white signs gave this warning:

NO TRESPASSING

PRIVATE PROPERTY

YOU ARE NOW ENTERING
PRIVATE PROPERTY AND
STREETS OWNED
BY RRHA.

UNAUTHORIZED PERSONS
WILL BE SUBJECT TO
ARREST AND PROSECUTION.

UNAUTHORIZED
VEHICLES WILL BE TOWED
AT OWNERS EXPENSE.

App. 4.

As owner of the private streets, the Housing Authority then implemented a written policy aimed at preventing trespass on the premises. Under the policy, trespassers were first notified to stay away, and then arrested if they refused to leave or if they returned. Those to be given such notice included "any person" found at Whitcomb Court who is not a resident or employee or who "cannot demonstrate a legitimate business or social purpose for being on the premises." App. 98. Pursuant to the policy, the Richmond Police Department was authorized to serve notices,

and to arrest any person for trespass if, having been duly notified, he either stayed upon Whitcomb Court property or returned to it. *Id.* The policy also provided a process by which those so barred from the premises might apply for permission to return by submitting a written application through the Housing Authority's director of housing operations. App. 62.

The respondent, Kevin Lamont Hicks, was barred from the property by notice delivered outside the courtroom immediately following a prior criminal conviction in April of 1998. There is no question about the receipt of notice. Hicks signed an acknowledgment in the presence of a police officer. App. 106-07.[2] The record does not reflect the facts that made it necessary to bar Hicks from the premises. The record does show that the conviction at issue here was not the first time that Hicks had been convicted for his activities at Whitcomb Court. He was previously convicted for trespassing there in February of 1998 and, again, in June of 1998. He was also convicted of damaging property there in April of 1998. App. 60. While Hicks twice asked the housing manager, Gloria Rogers, orally for permission to return, App. 44, there is no evidence that he ever availed himself of the written procedures by which such a request might be properly considered. Nor did he otherwise seek to challenge his

[2] The letter provided, in part: "This letter serves to inform you that effective immediately you are not welcome on Richmond Redevelopment and Housing Authority's Whitcomb Court or any Richmond Redevelopment and Housing Authority property. This letter is an official notice informing you that you are not to trespass on RRHA property. If you are seen or caught on the premises, you will be subject to arrest by the police." App. 106.

status as *persona non grata*. Instead, in direct defiance of the notice, he simply went back to the property.

In January of 1998, a Richmond police officer who knew Hicks – and knew he was barred – saw him walking along the sidewalk adjacent to Bethel Street, one of the streets closed to public traffic and conveyed to the Housing Authority. Thus, he was inside Whitcomb Court, on property owned by the Housing Authority, where he had been told not to return. The officer gave Hicks a summons for trespass.[3] App. 6.

Hicks was tried and convicted of trespass in the general district court in April of 1999.[4] He appealed his conviction to the Circuit Court of the City of Richmond where, pursuant to Virginia law, he received a trial *de novo*. Va. Code § 16.1-132, 17.1-513. Before this trial in the circuit court, Hicks moved to dismiss the charge on the grounds that it violated the federal and state constitutions, listing as his federal constitutional claims the First and Fourteenth Amendments. App. 86 (motion to dismiss). At a hearing on the motion, counsel for Hicks questioned Rogers, the Whitcomb Court housing manager. She explained that persons who were not barred and who were invited to the property by a resident were not affected by

[3] Hicks claimed to be there "to bring pampers for his baby." App. 61. There is no evidence that the officer saw any pampers, and no other evidence corroborating Hicks' claim that he was engaged on such an errand. Moreover, there is nothing in the trespass policy that would allow such an excuse to override a notice not to return. Nor does such an errand implicate any fundamental right.

[4] In Virginia, a general district court is a court not of record in which misdemeanors are tried in bench trials. Va. Code § 16.1-123.1.

the trespass policy. She also discussed an unwritten practice apparently originating in her implementation of the written policy. It was this unwritten practice that the Supreme Court of Virginia ultimately found to be problematic – and that Hicks was allowed to attack even though he had never engaged in the expressive conduct it purported to regulate.

According to Rogers, non-residents wishing to hold meetings on the premises or distribute leaflets must obtain permission in advance in order to be on the property. Requests to hold meetings, she said, were sometimes referred to a "community council." She had never turned down anyone wanting to pass out leaflets and said that, if she saw something she was not comfortable in approving, she would refer it to her supervisor. App. 102. The trial court ruled from the bench, denying the motion to dismiss without elaboration. A bench trial was held. Hicks was convicted of trespassing and sentenced to 12 months in jail and a $1,000 fine, both of which were suspended.[5] App. 82-83.

Hicks appealed his conviction to the Virginia Court of Appeals. There he again argued that the trespass policy and street privatization violated his rights to freedom of association under the First Amendment, and that, despite their privatization, the streets remained a public forum. App. 59, 66, 67. Hicks also renewed his attack on the trespass policy, arguing that it was unconstitutionally

[5] Based on that same conduct, Hicks was also found to have violated the terms of the suspended sentences imposed as a result of his previous three convictions. App. 84.

vague and overbroad. App. 60. A panel of the Court of Appeals rejected all of his constitutional claims and affirmed the decision of the trial court. *Id.*[6] Hicks then sought and obtained a rehearing *en banc* by the Virginia Court of Appeals, which ruled in his favor on the grounds asserted by the panel dissenter. In a 6-5 decision, the full court held that, notwithstanding the ordinance and deed, the streets in Whitcomb Court remained a public forum, and that the Housing Authorities efforts to regulate speech in that forum failed strict scrutiny and thus violated the First Amendment. The trespass conviction was overturned.[7]

The Commonwealth then sought and obtained review by the Supreme Court of Virginia. That Court affirmed the result below, but on a wholly different ground than the one used by the Court of Appeals.[8] The Virginia Supreme Court held that the Housing Authority's trespass policy is invalid because it is overly broad and infringes upon First Amendment rights. App. 2, 17. It reached this result in spite of the fact that there was no evidence that Hicks was ever engaged in – or ever sought to engage in – any

[6] One of the three judges dissented, expressing the view that the "barment-trespass procedure . . . unconstitutionally infringes upon a citizen's First and Fourteenth Amendment rights to lawfully congregate in a public place." App. 72.

[7] The trial court order revoking suspension of his three previous sentences was not set aside. Instead, the Court of Appeals remanded the issue to the trial court to reconsider the revocation in light of its opinion. App. 43, n.4.

[8] The grounds on which the Court of Appeals had ruled for Hicks were expressly vacated. App. 16. Hicks' state law claims were not addressed.

expressive conduct at Whitcomb Court. Thus, he never had occasion to ask Rogers whether he could pass out leaflets or hold a meeting or display a sign or engage in any other sort of expressive activity that she said required prior approval under her application of the trespass policy. Even so, the Supreme Court of Virginia ruled that – under this Court's overbreadth doctrine – Hicks was entitled to complain that Roger's unwritten practice was unconstitutional and, by prevailing on that point, escape conviction for a trespass wholly unrelated to the conduct regulated by the policy. In so ruling, the court ignored the decisions of other state and federal courts which had, with one exception, upheld the constitutionality of trespass-after-warning statutes and rejected the Commonwealth's argument that Hicks was not entitled to challenge the constitutional validity of the Housing Authority's practices or policies in the prosecution for trespass. App. 7.

Two members of the court dissented from the result, noting that "the majority does not separate the question of standing from its substantive First Amendment analysis." App. 18. The dissent found that Hicks lacked standing to assert a facial challenge to the trespass policy under the overbreadth doctrine, that he may only challenge those policies as they were applied to him, and that, as so applied, they were constitutional. The dissent also relied on this Court's decision in *Rucker* and explicitly noted the special concerns that arise when government acts as landlord of a public housing project:

> The policy of banning individuals who are not residents or employees of the Authority, or who cannot demonstrate a legitimate business or social purpose for coming onto the premises, is rationally related to, and advances, the legitimate governmental goal of preventing crime in public housing. Charging individuals with trespass when they enter upon the Authority's property after having been banned, as in the case of the defendant, also advances that goal. It must be remembered that the defendant is challenging his conviction for trespass in this appeal, not his barment from the Authority's property.

App. 26.

The Commonwealth brings this petition both to place clear limits on the use of overbreadth standing and to vindicate the authority of government, as landlord, to protect residents of public housing from the criminals under whose sway those at Whitcomb Court and elsewhere have been often forced to live.

REASONS WHY THE WRIT SHOULD BE GRANTED

This case implicates fundamental questions about the rules of constitutional adjudication and the ability of government to provide protection to law-abiding citizens living as tenants in public housing. This Court should grant review for two reasons.

First, this Court should grant review to decide an important federal question that has not been, but should be, decided by this Court. That question is whether a criminal defendant may escape conviction by invoking the overbreadth doctrine even though (i) his own offense did not involve *any* expressive conduct, and (ii) his conduct was not proscribed by that portion of the government policy he challenges as overbroad, but by *other* portions of the policy. Although this Court created the overbreadth doctrine as an exception to the general rules of standing, it

has never clearly articulated a bright line beyond which the overbreadth rationale is so attenuated that the criminal defendant will not be able to avail himself of the doctrine. This absence of a clear outer limit caused the lower court to allow Hicks to challenge an unwritten portion of the Whitcomb Court trespass policy dealing with the need to obtain approval before distributing leaflets, even though that type of activity had absolutely nothing to do with Hicks' own conduct. This Court should grant review to articulate a bright line limitation on the application of the overbreadth doctrine.

Second, this Court should grant review to resolve a conflict among federal and state appellate courts concerning the interpretation of the federal Constitution. In resolving the constitutionality of trespass-after-warning policies for government-owned housing projects, most appellate courts have recognized a distinction between government acting as landlord and government acting as sovereign. Using such a distinction, the appellate courts have generally upheld such policies. Similarly, this Court, in the context of eviction from public housing, has recognized a distinction between the government as landlord and the government as sovereign. However, the lower court did not recognize such a distinction. Consequently, the lower court struck down the housing authority's policy and allowed the trespasser to escape punishment. This conflict over the proper interpretation of the federal Constitution cannot be allowed to persist.

I. THE LIMITS OF OVERBREADTH STANDING PRESENT AN IMPORTANT FEDERAL QUESTION THAT SHOULD BE DECIDED BY THIS COURT.

This petition provides the Court an opportunity to set limits on the use of its overbreadth doctrine. It asks this

Court to decide whether a criminal defendant may escape conviction by invoking the overbreadth doctrine even though (i) his own offense did not involve *any* expressive conduct, and (ii) his conduct was not proscribed by that portion of the government policy he challenges as overbroad, but by *other* portions of the policy. This is an important question of federal law that has not been, but should be, settled by this Court.

This case presents an excellent vehicle for the Court to resolve this question. Hicks was not involved in any expressive activity when he trespassed on the property of Whitcomb Court. He was charged with trespass because he returned to the property after being notified in writing not to do so. There is no evidence that the notice barring his return was related to any previous expressive activity. Nor is there any suggestion that his previous convictions for misconduct at Whitcomb Court – two for trespass and one for damaging property – were related to any expressive activity. Hicks is a common trespasser and an incorrigible one. Yet, he was allowed to escape conviction for his fourth offense by challenging an unwritten portion of the Whitcomb Court trespass policy dealing with the need to obtain approval before passing out leaflets, an activity having absolutely nothing to do with Hicks' own conduct. Such a novel reading of the overbreadth doctrine goes well beyond anything this Court has previously recognized as an exception to the traditional rule of standing.

Under the traditional rule, "a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York v. Ferber*, 458 U.S. 747, 767

(1982) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973)). The rule is based on three fundamental principles. First, "constitutional rights are personal and may not be asserted vicariously." *Broadrick*, 413 U.S. at 610 (citing *McGowan v. Maryland*, 366 U.S. 420, 429-30 (1961)); *Ferber*, 458 U.S. at 767. Second, the rule reflects "prudential limitations on constitutional adjudication." *Ferber*, 458 U.S. at 767. "[I]t would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation." *Id.* at 768 (internal quotation marks and citations omitted). Third, the rule is "grounded in Art. III limits on the jurisdiction of federal courts to actual cases and controversies." *Id.* at 768 n.20.

Notwithstanding the first two principles – and acting within the limits imposed by the third – this Court created the overbreadth doctrine in order to expand the ability of courts to protect the First Amendment, a constitutional principle of paramount importance:

> [T]he Court has altered its traditional rules of standing to permit – in the First Amendment area – "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

Broadrick, 413 U.S. at 612 (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)).

Although the Court has stepped beyond traditional rules of standing for the sake of the First Amendment, it has nonetheless reaffirmed that "under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick*, 413 U.S. at 610-11 (citing *Younger v. Harris*, 401 U.S. 37, 52 (1971)). Thus, *Broadrick* did not go so far as to say that an allegedly unconstitutional provision may be challenged by *anyone* at all. This Court still requires a sufficient nexus between a litigant and the statute he attacks. Without a sufficient nexus, the litigant has no standing. Under *Broadrick*, how close the nexus must be in order to provide standing varies, depending on the circumstances. The ability of a criminal defendant to invoke the overbreadth doctrine "*attenuates* as the otherwise unprotected behavior that [the First Amendment] forbids the State to sanction moves from 'pure speech' toward conduct and that conduct – even if expressive – falls within the scope of otherwise valid criminal laws. . . . " *Broadrick*, 413 U.S. at 615 (emphasis added). Even so, what is lacking in *Broadrick* – and in this Court's other overbreadth cases – is the clear articulation of a cutoff point – a bright line beyond which the overbreadth rationale is so attenuated that the criminal defendant may not avail himself of the doctrine. It is the lack of a bright line that allowed the lower court to go astray in the case at bar. This petition provides an opportunity not only to correct the misstep below, but to prevent similar errors by other tribunals.

The bright line sought by the Commonwealth is simply this: before a criminal defendant will be allowed to escape conviction by vindicating the First Amendment rights of others, he must at least show (i) that *his own* conduct involved some sort of expressive activity, and (ii)

that his conduct falls within the particular prohibition he challenges as overbroad. Where he cannot make such a showing, the traditional rules of standing should still apply. While such a limit has never been expressly articulated by this Court, it is nonetheless consistent with its existing jurisprudence. Such a limit would be in keeping with this Court's history of treating overbreadth as "strong medicine" to be employed "sparingly and only as a last resort." *Broadrick*, 413 U.S. at 613. It would also be consistent with the Court's observation that "[o]verbreadth claims, if entertained at all, have been curtailed when invoked against ordinary criminal laws that are sought to be applied to protected conduct." *Id.* Moreover, each of the six cases cited by the Supreme Court of Virginia in discussing overbreadth standing involved facts consistent with the bright line sought by the Commonwealth. *See* App. 9.[9] Indeed, the Commonwealth is unaware of any case where this Court has overturned a conviction – or invalidated a statute – in a manner inconsistent with the

[9] These cases include: *Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999) (upholding statute regulating publisher's access to arrestees' addresses held by police); *Ferber* (upholding conviction of bookseller who sold films depicting sexual activities of young boys in violation of statute); *Broadrick* (upholding statute limiting partisan political activity by state employees against constitutional claim brought by employees charged with violating those limitations); *Gooding v. Wilson*, 405 U.S. 518 (1972) (affirming habeas relief for war protestor convicted of using opprobrious words and abusive language tending to cause breach of the peace, based on overbreadth of statute); *Dombrowski v. Pfister*, 380 U.S. 479 (1965) (allowing civil rights organizations to bring suit to enjoin prosecution under subversive activities statute, and noting that the organizations were affected by the statute they challenged) and *Thornhill v. Alabama*, 310 U.S. 88 (1940) (overturning conviction of picketer under statute found to be overbroad).

bright line rule sought by the Commonwealth. While such a rule is arguably implicit in this Court's jurisprudence, it has not yet been expressly articulated. This petition provides the Court an opportunity to do so.

In some cases, this Court has described the overbreadth doctrine in terms which, on their face, could be read as broad enough to permit overbreadth challenges whether or not the litigant was engaged in expressive activity. *See, e.g., Broadrick*, 413 U.S. at 612 ("[L]itigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because . . . the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."). Such broad language is not, of course, dispositive of the issue presented by this petition. As Justice Stevens noted, writing for the Court in the context of the First Amendment, "we learned long ago that broad statements of principle, no matter how correct in the context in which they are made, are sometimes qualified by contrary decisions before the absolute limit of the stated principle is reached." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 65 (1976).[10] Thus, notwithstanding the broad language of *Broadrick* and its progeny, it remains an open question whether the overbreadth doctrine is so broad as to benefit a criminal defendant whose conduct involved no expressive activity and fell

[10] A similar point was made by Justice Scalia, again in the context of the First Amendment: "It is of course contrary to all traditions of our jurisprudence to consider the law on this point conclusively resolved by broad language in cases where the issue was not presented or even envisioned." *R. A. V. v. City of St. Paul*, 505 U.S. 377, 386 (1992).

outside that portion of the governmental policy alleged to be overbroad.

Whether the overbreadth doctrine should be carried so far requires weighing those principles that undergird traditional rules of standing against those competing concerns that originally led to the development of the doctrine. It is a balance that, ultimately, only this Court can strike. Yet, in that balance, the three principles undergirding traditional limits on standing must carry special weight. The first principle is that constitutional rights may not be asserted vicariously. *Broadrick*, 413 U.S. at 610. Admittedly, this principle has been greatly diminished under the overbreadth doctrine. Yet, the overbreadth cases decided by this Court still reflect some nexus between the litigant's conduct and the right he purports to vindicate. Both involve some form of expressive activity. In the decision below, even that attenuated nexus was completely absent. Hicks was allowed to assert the expressive rights of others even though his own conduct involved no expression whatsoever. Surely, this goes too far.

The second principle consists of "prudential limitations on constitutional adjudication." *Ferber*, 458 U.S. at 767. As the Court has explained, "[b]y focusing on the factual situation before us, and similar cases necessary for development of a constitutional rule, we face 'flesh-and-blood' legal problems with data 'relevant and adequate to an informed judgment.'" *Id.* at 768. This principle, set aside in some measure in this Court's overbreadth cases, is marginalized even further by the decision below. Before a statute will be invalidated for overbreadth, the overbreadth "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615. Making such an

assessment involves a comparison between the legitimate and illegitimate applications of the statute in question. This can be difficult enough where the defendant's own case presents an example of expressive conduct that may be legitimately prohibited. But where a court has before it *no* expressive conduct, there are even fewer facts on which to base the necessary judicial balancing. In such a case, the prudential concerns that underlie the traditional rule of standing are especially strong and ought to limit the reach of the overbreadth exception.

Finally, there is the constitutional limitation provided by Article III. In ordinary overbreadth cases, the litigant asserting overbreadth standing has engaged in an action governed by *the same provision* he challenges as overbroad. In such case, there is enough of a connection between the litigant and the issue he raises to satisfy the requirement that there be "an actual case or controversy." *Ferber*, 458 U.S. at 768 n.20. There is no such nexus here. Hicks' conduct was not governed by the portion of the policy he challenged as overbroad. He complained that the housing manager had unfettered discretion in approving who could come on the property to hold meetings or distribute leaflets. But Hicks was not charged with trespass because he sought to engage in expressive conduct without permission. He was charged for returning to the property after being told in writing to stay away. Thus, he was a total stranger to the dispute he was allowed to litigate. To find an "actual case or controversy" in such a situation would render those words meaningless, eviscerate the limitations on jurisdiction and convert courts into the sort of "roving commissions" this Court has scorned as alien to our constitutional system. *Broadrick*, 413 U.S. at 611.

In sum, the decision by the Supreme Court of Virginia represents, at best, a significant expansion of the overbreadth doctrine. At worst, it reflects a fundamental misreading of this Court's precedents.[11] In either case, the decision below merits review and will allow this Court to draw an outer boundary for use of overbreadth standing. The Court may decide that a criminal defendant does not have access to overbreadth standing unless his own conduct involved some sort of expressive activity. Additionally – or alternatively – the Court may limit overbreadth challenges to cases where the litigant's own conduct falls under that portion of the statute, regulation or policy being challenged as overbroad. Or, the Court may use this case to fashion some other rule providing guidance regarding the intended reach of overbreadth standing. Regardless of the answer the Court may give, this petition presents a question about the overbreadth doctrine that has not been, but should be, settled by this Court. Certiorari should be granted.

[11] This is the second case within a year where the Supreme Court of Virginia has overturned a criminal conviction based on a novel reading of the overbreadth doctrine. In the earlier case, *Black v. Virginia*, 553 S.E.2d 738 (2001), *cert. granted*, 122 S. Ct. __ (2002), the court struck down the Virginia statute banning cross-burning with intent to intimidate, Va. Code § 18.2-423. In so ruling, the court relied, in part, on its view that the overbreadth doctrine could be invoked when innocent persons might be charged under a statute, even though the statute's prohibitory terms did not bar any protected expression whatsoever. This issue is now before this Court on a writ of certiorari. Coming on the heels of *Black* – and from the same lower court – this case provides the Court with an especially useful opportunity to set limits on its overbreadth jurisprudence.

II. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT AMONG THE FEDERAL AND STATE APPELLATE COURTS.

The constitutional interpretation of the court below is in direct conflict with the decisions of other state appellate courts and federal courts. The nature of this conflict has profound implications for our constitutional system. Accordingly, this Court should grant review to resolve the conflict.

A. There Is a Conflict Among the Federal and State Appellate Courts on the Issue of Whether Government Acting as Landlord Is Accorded Broader Discretion Than Government Acting as Sovereign.

In *Department of Housing and Urban Development v. Rucker,* 122 S. Ct. 1230 (2002), this Court held that when government acts as a landlord of public housing, it may impose restrictions on the use and occupation of its property that it could not constitutionally impose on citizens generally in its capacity as sovereign. *Rucker,* 122 S. Ct. at 1236. Although *Rucker* marks the first time that this Court had formally articulated such a distinction, and although *Rucker* is limited to the context of property interests protected by due process, a similar distinction has been recognized by federal courts of appeal and state appellate courts in the context of trespass-after-warning provisions. Unfortunately, the court below did not acknowledge such a distinction and, instead, implicitly held that, when government acts as landlord, it is bound by the same constraints as a government acting as sovereign. Thus, the court below is in direct conflict with the other lower appellate courts.

1. Other Appellate Courts Consistently Have Permitted Government as Landlord to Have Broader Discretion than Government as Sovereign.

Prior to the decision of the lower court, federal and state appellate courts had universally recognized that there is a distinction between government as sovereign and government as landlord. Moreover, all of these courts had utilized this distinction to hold that policies excluding non-residents from government-owned residential properties are not unconstitutional.

a. Washington:

Most recently, in *City of Bremerton v. Widell*, 51 P.3d 733 (Wash. 2002), the Supreme Court of Washington held that there is no constitutionally protected right to enter a public housing authority's property, explaining that "the State, no less than a private property owner, 'may control the use of its property so long as the restriction is for a lawful, nondiscriminatory purpose.'" *Id.* at 743 (citing *Adderley v. Florida*, 385 U.S. 39, 47 (1966)). In other words, when the State acts as a landlord, its discretion is much broader than it is when it acts as sovereign.

b. Minnesota:

Likewise, in *Minnesota v. Holiday*, 585 N.W.2d 68 (Minn. App. 1998), the Court of Appeals in Minnesota pointed out that "government, no less than a private owner of property, has the right to limit access to its property." *Id.* at 71. In keeping with the private owner analogy, the court relied on agency theory. Holding that police cannot have any greater authority to exclude than

that of the tenants, whose agents they are, the court struck down a trespass conviction under a trespass-after-warning ordinance that sought to ban individuals from *all* of the property owned by the housing authority throughout the city. *Id.* at 71.

c. Sixth Circuit:

Similarly, the Sixth Circuit has concluded that the trespass-after-warning policy of the Knoxville public housing authority does not implicate any fundamental right and reasonably advances the goal of suppression and prevention of crime in public housing. *Thompson v. Ashe*, 250 F.3d 399 (6th Cir. 2001). Acknowledging that the Knoxville Community Development Corporation ("KCDC") is a public housing authority "organized under the laws of Tennessee," the court went on to describe the particular role of that government entity:

> "KCDC manages twelve residential housing developments that provide housing to some 9000 low-income individuals. . . . KCDC is required to provide its tenants with decent, safe, and sanitary places to live.
>
> * * *
>
> KCDC properties are prominently posted with 'no trespassing' signs . . . [T]he City of Knoxville has leased to KCDC certain interior streets and sidewalks within the housing developments . . . KCDC, in turn, contracts with the City to provide supplemental police services.

Thompson, 250 F.3d at 403-04.

Focusing on KCDC's role as landlord, the Sixth Circuit did not find it necessary to examine the "no

trespass policy" as a regulation by government acting as sovereign that might be applied to the general population. Instead, the court focused its analysis on the rights and interests of the non-resident trespasser with regard to access to KCDC's properties, clearly treating the government more like a traditional property owner. As a result, the court required that the government have only a rational basis for its policy. Examining the "precise nature of the government function involved," the court described KCDC's mandate "to provide its residents a safe place to live." *Id.* at 408. This, of course, is the quintessential description of a government acting as a landlord, not as sovereign.

d. Eleventh Circuit:

In *Daniel v. City of Tampa,* 38 F.3d 546 (11th Cir. 1994), the Eleventh Circuit determined that government could restrict access to government-owned property, dedicated for residential use by eligible low income families. In reaching this result, the Court concluded that the property must be treated as a non-public forum and that the applicable constitutional standard (for government acting as landlord in that context) was that restrictions on access to the property need be only reasonable and content neutral. *Daniel*, 38 F.3d at 550. Finding no evidence that the appellant was arrested because government disagreed with his message, and that enforcement of the statute was a reasonable means of combating the rampant drug and crime problems within the housing authority property, the Eleventh Circuit held that the conviction of an individual who had entered onto the housing authority's property to post signs and distribute flyers, pursuant to Florida's

trespass-after-warning statute, did not violate his First Amendment rights. *Id.*

e. Fifth Circuit Panel:

Finally, a panel decision of the Fifth Circuit, recently vacated with a grant of rehearing en banc, also supports the proposition that there is a distinction between government as landlord and government as sovereign. *See Vasquez v. Housing Authority of the City of El Paso*, 271 F.3d 198, 203 (5th Cir. 2001), *vacated and reh'g en banc granted sub nom. De La O v. Housing Authority*, 289 F.3d 350 (5th Cir. 2002). Although the *Vasquez* panel, in direct conflict with the Eleventh Circuit's decision in *Daniel*, struck down a trespass-after-warning statute as an unreasonable restriction on the First Amendment rights of residents to receive information, it nevertheless explicitly acknowledged the unique character of the public housing property as limited in purpose to providing affordable housing to low income citizens. 271 F.3d at 202. In addition, ruling that the trespass-after-warning statute, as applied to political candidates, was an unreasonable restriction on the rights of residents, the court noted that "the Government, *even when acting in its proprietary capacity*, does not enjoy absolute freedom from First Amendment constraints." *Id.* at 203 (emphasis added). The clear implication of this language is that, though not entirely free of constitutional limitations, government is treated differently when it acts as landlord than when it acts as sovereign.

2. The Court Below Disregarded the Distinction Between Government Acting as Landlord and Government Acting as Sovereign.

Although every other court to address the constitutionality of trespass-after-warning policies for public housing projects has recognized the distinction between government as sovereign and government as landlord, the lower court did not acknowledge any such distinction. Instead, the Virginia Supreme Court treated government efforts to regulate access to residential property as if government were acting as sovereign and "attempting to criminally punish or civilly regulate members of the general populace." *Rucker*, 122 S. Ct. at 1236. Indeed, the court below reviewed the trespass-after-warning policy of the Richmond Redevelopment and Housing Authority without any hint of distinction, recognized by every other court to consider the issue, between government acting as landlord and government acting as sovereign. Although it held that the regulation violated the First Amendment, the lower court, unlike the courts in Washington, Minnesota, and the federal circuits, did not conduct an analysis of the nature of the Housing Authority's property as a forum and therefore ignored the residential character of the property the government sought to regulate. It engaged in no discussion of the government's distinct role with regard to regulating access to a particular piece of government owned residential property, or its substantial interest, as landlord, in providing its tenants with a safe, clean and healthy place to live. Instead, it treated the policy as a "government action granting government officials standardless discretion." App. 9.

The standard applied by the lower court is a standard applied to government when it is attempting to regulate

the populace at large. *See, e.g., City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969) (invalidating ordinance requiring marchers to seek permission from mayor); *Kunz v. New York*, 340 U.S. 290, 293-94 (1951) (invalidating ordinance prohibiting public worship without a permit from police commissioner); *Saia v. New York*, 334 U.S. 558, 559-61 (1948) (invalidating ordinance that required operators of sound trucks to obtain permission from police chief). While it may be the appropriate standard to apply to government acting as sovereign, it is not the standard to apply when government is acting as landlord.

This Court should grant this petition to resolve the conflict and make clear the appropriate standard for evaluating constitutional challenges to trespass policies implemented by government acting as landlord.

B. This Conflict Has Profound Constitutional Implications.

Moreover, this conflict among the lower courts of appeal is not a simple matter of jurisprudential semantics. Rather, it has profound constitutional implications that counsel for immediate resolution by this Court.

First, the lower court's notion that there is no constitutionally significant distinction between actions of the government as sovereign and actions of the government as landlord directly conflicts with this Court's explicit recognition of such a distinction in *Rucker*. This Court has long recognized that government, acting as sovereign, may not deprive persons of their property interests without due process. *See Scales v. United States*, 367 U.S. 203 (1961); *Southwestern Telegraph & Telephone Co. v. Danaher*, 238

U.S. 482 (1915). Yet, just last term, this Court held that government, acting as landlord, may evict public housing tenants simply because their guests engage in drug crimes. *Rucker,* 122 S. Ct. at 1236. Although *Rucker* is limited to the eviction of tenants and does not address the exclusion of non-residents, it would be nonsensical for the distinction between government as landlord and government as sovereign to exist in the context of one public housing regulation but not another.

Second, the lower court's rejection of such a distinction is at odds with this Court's explicit recognition of a similar distinction between government as employer and government as sovereign. For example, this Court has repeatedly emphasized that when government, acting as sovereign, creates a forum for others to speak, it may not impose viewpoint regulations. *See Board of Regents of the Univ. of Wisconsin v. Southworth*, 529 U.S. 217, 229 (2000). However, when government, acting as employer, directs its employees to speak, it may certainly tell them what to say. *See Rust v. Sullivan*, 500 U.S. 173, 198-99 (1991). Given that there is a distinction between government as employer and government as sovereign, it would be odd if there were not a similar distinction between government as sovereign and government as landlord.

Third, if, as the lower court implied, there is no distinction between government as sovereign and government as landlord, it will severely compromise the ability of public housing authorities to deal with the "reign of terror on public and other federally assisted low-income housing tenants." *Rucker*, 122 S. Ct. at 1232 (quoting the Anti-Drug Abuse Act of 1988, 42 U.S.C. § 11901(3)). If the government may evict tenants because some family members are involved in drug crime, as *Rucker* allows,

then government logically may take measures reasonably aimed at excluding persons involved in drug crime from frequenting the property. Yet, because the lower court assumed that there is no distinction between government acting as sovereign and government acting as landlord, the lower court invalidated *all* aspects of the policy. Thus, no part of the housing authority policy, even that part which would have excluded drug dealers bent on a reign of terror, remains in effect. Moreover, as a practical matter, the lower court's failure to recognize a distinction between government as sovereign and government as landlord, means that any constitutional misstep on the part of the low-level public servants who run the housing authority results in a complete invalidation of policies designed to protect tenants from the "reign of terror" perpetrated by drug dealers. Such a constitutional rule can only chill government employees in the exercise of their duties to protect the tenants of public housing.

C. Summary

Quite simply, this court's jurisprudence must recognize a distinction between government as sovereign and government as landlord. There is a fundamental difference between the legislature enacting a statute that applies to all citizens throughout the State and a low-level public servant implementing a policy for a public housing project. While neither the legislature nor the public servant should be allowed to violate the Constitution, the analysis of whether there has been a constitutional violation should depend upon whether government was acting as a sovereign or as a landlord. *See Rucker*, 122 S. Ct. at 1236. Most lower appellate courts have recognized this necessity, but

the court below did not. This Court should grant review to resolve the conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted:

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September 5, 2002

COMMONWEALTH OF VIRGINIA
v.
KEVIN LAMONT HICKS

Record No. 011728
SUPREME COURT OF VIRGINIA
264 Va. 48; 563 S.E.2d 674; 2002 Va. LEXIS 71
June 7, 2002, Decided

COUNSEL:

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Steven D. Benjamin (Betty Layne DesPortes; Benjamin & DesPortes, on brief), for appellee.

Amicus Curiae: City of Richmond and Richmond Redevelopment and Housing Authority (John A. Rupp, City Attorney; Norman B. Sales, Senior Assistant City Attorney; William G. Broaddus; Johnathan T. Blank; William H. Baxter, II; Godfrey T. Pinn, Jr.; McGuireWoods, on brief), in support of appellant.

Amicus Curiae: American Civil Liberties Union of Virginia, Inc. (Rebecca K. Glenberg, on brief), in support of appellee.

JUDGES:

OPINION BY JUSTICE LEROY R. HASSELL, SR. JUSTICE KINSER, with whom JUSTICE LEMONS joins, concurring in part and dissenting in part.

OPINION BY:

LEROY R. HASSELL, SR.

OPINION:

Present: All the Justices

OPINION BY JUSTICE LEROY R. HASSELL, SR.

The narrow issue that we consider in this appeal is whether a redevelopment and housing authority's trespass policy is overly broad and thereby violates the First and Fourteenth Amendments to the Constitution of the United States.

I.

Kevin Lamont Hicks was charged with trespass in violation of Code § 18.2-119 and three violations of the conditions of suspended sentences imposed upon him for prior trespass convictions. He was tried and convicted in the City of Richmond General District Court.

Hicks appealed the convictions to the Circuit Court of the City of Richmond, and he filed a motion to dismiss the charges against him on the basis that a redevelopment and housing authority's trespass policy contravened the First and Fourteenth Amendments to the Constitution of the United States. The circuit court denied the motion. At the conclusion of a bench trial, Hicks was convicted of trespass and sentenced to 12 months in jail, which was suspended. The circuit court also revoked Hicks' prior suspended sentences.

Hicks appealed the judgment to the Court of Appeals. A panel of the Court of Appeals affirmed the judgment, *Hicks v. Commonwealth,* 33 Va. App. 561, 535 S.E.2d 678 (2000), but the Court of Appeals en banc disagreed with the panel and vacated Hicks' conviction because the

redevelopment and housing authority's trespass policy contravened the First and Fourteenth Amendments to the Constitution of the United States. *Hicks v. Commonwealth*, 36 Va. App. 49, 52, 548 S.E.2d 249, 251 (2001). The Commonwealth appeals.

II.

The Richmond Redevelopment and Housing Authority (Housing Authority) is a political subdivision of the Commonwealth of Virginia. The Housing Authority owns and operates a housing development in the City of Richmond for low income residents known as Whitcomb Court. The City of Richmond owned the streets located within Whitcomb Court.

In an effort to eradicate illegal drug activity in Whitcomb Court, which was described as an "open-air drug market," the Housing Authority sought to deny access to its property to persons who did not have legitimate reasons to visit the housing development. The majority of persons who had been arrested for drug crimes at the Whitcomb Court housing development were individuals who did not reside there.

The Richmond City Council enacted an ordinance that "closed to public use and travel and abandoned as streets of the City of Richmond," streets in Whitcomb Court because those streets were "no longer needed for the public convenience." The City conveyed the streets by a recorded deed to the Housing Authority.

The deed required that the Housing Authority "make provisions to give the appearance that the closed streets, particularly at the entrances, are no longer public streets

and that they are in fact private streets." The Housing Authority's employees affixed red and white signs to each apartment building in Whitcomb Court. The signs are also located "every 100 feet" along the streets in Whitcomb Court and are "approximately 18 inches to almost 24 inches by about 12 inches" in size. The signs state:

> "NO TRESPASSING
>
> "PRIVATE PROPERTY
>
> "YOU ARE NOW ENTERING
>
> PRIVATE PROPERTY AND
>
> STREETS OWNED
>
> BY RRHA.
>
> "UNAUTHORIZED PERSONS
>
> WILL BE SUBJECT TO
>
> ARREST AND PROSECUTION.
>
> "UNAUTHORIZED
>
> VEHICLES WILL BE TOWED
>
> AT OWNERS EXPENSE."

The Housing Authority, in its capacity as owner of the private streets, authorized

> "each and every Richmond Police Department officer to serve notice, either orally or in writing, to any person who is found on Richmond Redevelopment and Housing Authority property when such person is not a resident, employee, or such person cannot demonstrate a legitimate business or social purpose for being on the premises. Such notice shall forbid the person from returning to the property. Finally, Richmond Redevelopment and Housing Authority authorizes Richmond Police Department officers to arrest any person for trespassing after such person, having been duly notified, either stays upon or returns to Richmond Redevelopment and Housing Authority property."

As a part of the Housing Authority's unwritten policies, Gloria S. Rogers, the Housing Authority's housing manager for Whitcomb Court, was required to determine whether a person can demonstrate a legitimate business or social purpose to use the Housing Authority's property. Pursuant to these policies, individuals who sought access to the Housing Authority's property, including the streets, needed to obtain Rogers' permission for such access. Rogers stated that if a person desired to disseminate materials or participate in an activity on the property, that person must obtain her authorization. Sometimes, she referred such request to a "community council" which met with "the Board and the residents." She also testified that if an individual submitted a request to distribute flyers and the request was not "routine," she referred that request to the Housing Authority's director of housing operations for resolution. The Housing Authority, however, has not promulgated any written policies or procedures that govern decisions regarding who may distribute materials or participate in activities on the Housing Authority's property.

Pursuant to the Housing Authority's unwritten policies, an individual who is not authorized to use the Housing Authority's property and does so is warned by the Richmond Police Department. The Housing Authority

forwards a letter to that individual informing him that he may not lawfully return to the property.

On January 20, 1999, Richmond police officer James J. Laino, who was driving a police car on Bethel Street, observed Hicks, who was walking on a sidewalk on that street. Bethel Street is one of the streets that the City conveyed to the Housing Authority and that street is located entirely within Whitcomb Court.

Laino, who had known Hicks for about four years, approached him. Laino knew that Hicks had been notified that he was barred from the Housing Authority's property. Laino informed Hicks that he was "not supposed to be out here," and Laino issued a summons to Hicks for trespass.

Rogers had also spoken with Hicks on two prior occasions and told him that he could not appear on the Housing Authority's property. Hicks had been arrested on two prior occasions for trespass on the Housing Authority's property. On April 14, 1998, Hicks signed a letter that was hand delivered to him by Rogers. The letter, which the parties describe as a barment notice, states in part:

> "This letter serves to inform you that effective immediately you are not welcome on Richmond Redevelopment and Housing Authority's Whitcomb Court or any Richmond Redevelopment and Housing Authority property. This letter is an official notice informing you that you are not to trespass on RRHA property. If you are seen or caught on the premises, you will be subject to arrest by the police."

III.

A.

The Commonwealth argues that Hicks is not entitled to challenge the constitutional validity of the Housing Authority's practices or policies in the criminal prosecution for trespass. The Commonwealth contends that Hicks instead was required to challenge the barment notice he received from the Housing Authority or the Housing Authority's policies and practices, presumably in a separate proceeding. We disagree.

In this case, Hicks has asserted a constitutional challenge to a conviction. Hicks pled in a written pretrial motion that the Housing Authority's trespass procedures and policy violated the First Amendment. At trial, Hicks argued that the Housing Authority's trespass procedures and policy were unconstitutional.

Contrary to the Commonwealth's assertions, Hicks was not required to file a civil proceeding to challenge the Housing Authority's trespass policies and practices. Rather, this defendant was entitled to challenge the validity of his conviction on the basis that the Housing Authority's practices and procedures contravened his constitutional rights. We observe that in other contexts, we have permitted defendants to assert constitutional challenges to convictions in criminal prosecutions, *see, e.g.*, *Remington v. Commonwealth*, 262 Va. 333, 344-45, 551 S.E.2d 620, 628 (2001); *McCain v. Commonwealth*, 261 Va. 483, 489-90, 545 S.E.2d 541, 544-45 (2001); *Lenz v. Commonwealth*, 261 Va. 451, 460-62, 544 S.E.2d 299, 304-05 (2001); *Burns v. Commonwealth*, 261 Va. 307, 321-23, 541 S.E.2d 872, 882-83 (2001); *Pitt v. Commonwealth*, 260 Va. 692, 695-96, 539 S.E.2d 77, 78-79 (2000). We also note that

the Supreme Court has permitted criminal defendants to assert constitutional challenges to various ordinances in criminal prosecutions. *See,* e.g., *Lovell v. City of Griffin,* 303 U.S. 444, 452, 82 L. Ed. 949, 58 S. Ct. 666 (1938).

B.

Hicks argued in the Court of Appeals, and he argues here, that the Housing Authority's trespass procedures are overly broad and, therefore, violate fundamental constitutional rights to freedom of speech guaranteed by the First Amendment to the Constitution of the United States. Responding, the Commonwealth contends that the Housing Authority's trespass policy is not overly broad. The Commonwealth also asserts that a defendant who raises a facial constitutional challenge must demonstrate a substantial risk that the application of the challenged policy will result in suppression of protected speech.

The First Amendment states in part that "Congress shall make no law . . . abridging the freedom of speech." The Supreme Court has stated that this "freedom is among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action; and municipal ordinances adopted under state authority constitute state action." *Staub v. City of Baxley*, 355 U.S. 313, 321, 2 L. Ed. 2d 302, 78 S. Ct. 277 (1958); *accord Palko v. Connecticut*, 302 U.S. 319, 324-25, 82 L. Ed. 288, 58 S. Ct. 149 (1937), *overruled on other grounds*, *Benton v. Maryland*, 395 U.S. 784, 794, 23 L. Ed. 2d 707, 89 S. Ct. 2056 (1969); *Stromberg v. California*, 283 U.S. 359, 368, 75 L. Ed. 1117, 51 S. Ct. 532 (1931); *Gitlow v. New York*, 268 U.S. 652, 666, 69 L. Ed. 1138, 45 S. Ct. 625 (1925).

The Supreme Court has held that in the context of a First Amendment challenge, a litigant may challenge government action granting government officials standardless discretion even if that government action as applied to the litigant is constitutionally permissible. For example, the Supreme Court stated in *Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32, 38, 145 L. Ed. 2d 451, 120 S. Ct. 483 (1999):

> "The traditional rule is that 'a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court.' *New York v. Ferber*, 458 U.S. 747, 767, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 610, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973)).
>
> "Prototypical exceptions to this traditional rule are First Amendment challenges to statutes based on First Amendment overbreadth. 'At least when statutes regulate or proscribe speech . . . the transcendent value to all society of constitutionally protected expression is deemed to justify allowing "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity."' *Gooding v. Wilson*, 405 U.S. 518, 520-521, 31 L. Ed. 2d 408, 92 S. Ct. 1103 (1972) (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486, 14 L. Ed. 2d 22, 85 S. Ct. 1116 (1965)). 'This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their right for fear of criminal sanctions provided by a statute susceptible of application to protected

> expression.' *Gooding v. Wilson*, [405 U.S.] at 520-521. *See also Thornhill v. Alabama*, 310 U.S. 88, 84 L. Ed. 1093, 60 S. Ct. 736 (1940)."

The Supreme Court has also pointed out that the overbreadth doctrine is "strong medicine" and this doctrine should be employed "sparingly and only as a last resort." *Broadrick*, 413 U.S. at 613.

The Supreme Court has consistently and repeatedly invalidated government policies that facially vested officials with broad and unfettered discretion to regulate speech. *See, e.g.*, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153, 22 L. Ed. 2d 162, 89 S. Ct. 935 (1969) (invalidating ordinance requiring marchers to seek permission from mayor); *Kunz v. New York*, 340 U.S. 290, 293-94, 95 L. Ed. 280, 71 S. Ct. 312 (1951) (invalidating ordinance prohibiting public worship without a permit from police commissioner); *Saia v. New York*, 334 U.S. 558, 559-61, 92 L. Ed. 1574, 68 S. Ct. 1148 (1948) (invalidating ordinance that required operators of sound trucks to obtain permission from police chief).

The Supreme Court stated in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 763-64, 100 L. Ed. 2d 771, 108 S. Ct. 2138 (1988):

> "[A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official. We have often and uniformly held that such statutes or policies impose censorship on the public or the press, and hence are unconstitutional, because without standards governing

> the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker. *E.g.*, *Cox v. Louisiana*, 379 U.S. [536], 557 [(1965)]; *Staub*, 355 U.S. at 322. Therefore, even if the government may constitutionally impose content-neutral prohibitions on a particular manner of speech, it may not condition that speech on obtaining a license or permit from a government official in that official's boundless discretion. It bears repeating that 'in the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether . . . his conduct could be proscribed by a properly drawn statute, and whether . . . he applied for a license.' *Freedman* [*v. Maryland*], 380 U.S. [51], 56 [(1965)]."

In *Lakewood*, the Supreme Court applied these principles and invalidated a city ordinance that permitted a mayor to grant or deny a permit to a publisher who desired to place a news rack on a sidewalk. The ordinance placed no limits on the mayor's discretion to grant or deny the requested permit. The Supreme Court stated that this lack of limitations upon an official's discretion "renders the guarantee against censorship little more than a high sounding ideal." 486 U.S. at 769-70.

In *Staub, supra*, the Supreme Court invalidated an ordinance that permitted a mayor and a city council to grant or deny a permit to a labor union allowing it to solicit members based upon the "effects upon the general welfare of citizens of the City of Baxley." The Court stated:

"These criteria are without semblance of definitive standards or other controlling guides governing the action of the Mayor and Council in granting or withholding a permit. *Cf. Niemotko v. Maryland*, 340 U.S. 268, 271-273, 95 L. Ed. 267, 71 S. Ct. 325 [(1951)]. It is thus plain that they act in this respect in their uncontrolled discretion.

"It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official – as by requiring a permit or license which may be granted or withheld in the discretion of such official – is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms."

355 U.S. at 322. And, in *Schneider v. State*, 308 U.S. 147, 163-64, 84 L. Ed. 155, 60 S. Ct. 146 (1939), the Supreme Court invalidated a city ordinance that banned "communication of any views or the advocacy of any cause from door to door" without a written permit from the chief of police. The Court held that the ordinance was a restraint upon First Amendment rights and stated that the ordinance "strikes at the very heart of the constitutional guarantees." *Id.* at 164.

We also observe that in *Lovell*, *supra*, the Supreme Court invalidated a city ordinance that prohibited the distribution of circulars, handbooks, advertising, or literature of any kind without first obtaining written permission from the city manager of the City of Griffin. Alma Lovell, who was convicted for violation of this criminal ordinance and sentenced to imprisonment,

asserted that the ordinance was facially invalid. The Court observed:

"We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing.' And the liberty of the press became initially a right to publish 'without a license what formerly could be published only with one.' While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision. . . . Legislation of the type of the ordinance in question would restore the system of license and censorship in its baldest form."

303 U.S. at 451-52 (footnote omitted).

Applying the principles established by the Supreme Court, we hold that the Housing Authority's trespass policy is invalid because it is overly broad and it infringes upon First Amendment protections. Even though the Housing Authority's trespass policy, which is written in part and unwritten in part, is designed to punish activities that are not protected by the First Amendment, the policy also prohibits speech and conduct that are clearly protected by the First Amendment. Also we note that Hicks is entitled to assert a facial constitutional challenge to the Housing Authority's trespass policy even though a portion

of that policy is unwritten. To hold otherwise would permit the government to violate a citizen's First Amendment protections by simply refusing to memorialize unconstitutional policies in a written document. We observe that the United States Supreme Court and the various United States Courts of Appeals have permitted litigants to assert First Amendment facial challenges to unwritten government policies. *See Niemotko v. Maryland*, 340 U.S. at 271-73 (unwritten practice of issuance of licenses to use a public park for meetings); *Wells v. City & County of Denver*, 257 F.3d 1132, 1150-51 (10th Cir.); *cert. denied*, 151 L. Ed. 2d 384, ___ U.S. ___, 122 S. Ct. 469 (2001) (unwritten policy that banned unattended holiday displays); *Lebron v. AMTRAK*, 69 F.3d 650, 659, *amended by* 89 F.3d 39, 39 (2d Cir. 1995) (unwritten policy that banned political advertisements); *Tipton v. University of Hawaii*, 15 F.3d 922, 927-28 (9th Cir. 1994) (unwritten policy "as manifested in the University's application of its written policy"); *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1197-99 (11th Cir. 1991) (unwritten scheme for regulating the placement of newspaper racks).

Rogers, the Housing Authority's housing manager for Whitcomb Court, testified that the Housing Authority has not implemented written procedures or guidelines concerning the enforcement of the trespass policy. The Housing Authority has not implemented any guidelines that delineate how an individual may obtain permission to use the property. Even though "authorized" persons may use the Housing Authority's property, Rogers, in the exercise of her unfettered discretion, is the government official who determines whether an individual is authorized.

Rogers also has unfettered discretion to determine who can distribute literature at the Whitcomb Court

housing development and, pursuant to the Housing Authority's unwritten trespass policy, a non-resident of Whitcomb Court can only distribute such literature if that non-resident obtains authorization from Rogers. Rogers testified that she will permit non-residents to distribute material only if she is "used to seeing" the material. Rogers testified as follows:

> "Question: If an organization wanted to use the privatized street or sidewalk in a housing community in order to hold some sort of demonstration, in order to walk back and forth with signs in support of some sort of political position, would they be permitted on the property if they were nonresidents?
>
> "Answer: They could get permission first. And I would say, again, I need it in writing to see the nature or whatever. They need permission first to be on the property.
>
> "Question: Are you in a position – does your position enable you to tell people – to give people permission to come on and picket or demonstrate on housing community property?
>
> "Answer: I'm not sure what you're asking. To picket? I've had people to call to pass out flyers, and asked to have church services. And these are things I'm used to.
>
> "As far as picketing and stuff, I never had that so I'm not familiar with it.
>
> "Question: Let's talk about what you're used to.
>
> "Answer: Okay.

"Question: With situations such as those, people wanting to pass out flyers for example, or hold church related meetings, do they have to come to you for permission?

"Answer: Yes.

"Question: Then do you give permission?

"Answer: Depending on the circumstances, sometimes it's granted, yes.

"Question: Sometimes you do and sometimes you don't?

"Answer: Correct."

Based upon the record before this Court, Rogers has the unfettered discretion to determine not only who has a right to speak on the Housing Authority's property, but she may prohibit speech that she finds personally distasteful or offensive even though such speech may be protected by the First Amendment. She may even prohibit speech that is political or religious in nature. However, a citizen's First Amendment rights cannot be predicated upon the unfettered discretion of a government official.

We recognize that the Court of Appeals decided this case on the basis that the Housing Authority's private streets constitute a public forum and that the Housing Authority's efforts to regulate speech in that forum contravene the First Amendment. In view of our limited holding, we need not resolve this issue and, thus, we will vacate that portion of the judgment of the Court of Appeals, and we will reserve consideration of this issue for another day. Also, we need not, and we do not, express any views regarding the litigants' remaining contentions.

IV.

We will affirm the judgment of the Court of Appeals on the narrow basis that the Housing Authority's trespass policy is overly broad and that Hicks may assert this issue in this criminal prosecution.

Affirmed in part,

vacated in part,

and final judgment.

DISSENT BY:

KINSER (In Part)

DISSENT:

JUSTICE KINSER, with whom JUSTICE LEMONS joins, concurring in part and dissenting in part.

Today, the majority holds that the trespass policy of the Richmond Redevelopment and Housing Authority (the Authority) is "overly broad and . . . infringes upon First Amendment protections" because the Authority's housing manager, according to the majority, has "unfettered discretion" to determine whether an individual is authorized to be on the Authority's property. The majority reaches this issue by allowing the defendant to make a facial challenge to the Authority's trespass policy. I do not believe that such a challenge is permissible in this case.

A facial challenge to a statute, or in this case, to the trespass policy, can proceed under two different doctrines. "First, the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's

plainly legitimate sweep.'" *City of Chicago v. Morales*, 527 U.S. 41, 52, 144 L. Ed. 2d 67, 119 S. Ct. 1849 (1999) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973)). Under the second doctrine, even if a statute is not overbroad (*i.e.*, it "does not reach a substantial amount of constitutionally protected conduct"), "it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." *Id.* (citing *Kolender v. Lawson*, 461 U.S. 352, 358, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983)).

The majority utilizes the overbreadth doctrine to find the trespass policy unconstitutional on its face. Explaining the defendant's standing, the majority states that, "in the context of a First Amendment challenge, a litigant may challenge government action granting government officials standardless discretion even if that government action as applied to the litigant is constitutionally permissible." The majority intertwines its examination of the standing issue and its substantive analysis of the trespass policy, and in doing so, uses its view that the trespass policy grants unfettered discretion to the housing manager to decide who can come onto the Authority's property to support its conclusion that the defendant has standing to make a facial challenge. In other words, the majority does not separate the question of standing from its substantive First Amendment ruling.

To support this finding of unfettered discretion and thus standing, the majority relies upon a line of cases involving prior restraints upon the exercise of First Amendment rights. Each of the cases cited by the majority addressed a statute requiring a license or permit to engage in First Amendment activity. *See, e.g.*, *City of Lakewood v.*

Plain Dealer Publishing Co., 486 U.S. 750, 769, 100 L. Ed. 2d 771, 108 S. Ct. 2138 (1988) (invalidating ordinance requiring publishers to obtain permit from mayor for placing newsracks on sidewalk); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153, 22 L. Ed. 2d 162, 89 S. Ct. 935 (1969) (invalidating ordinance requiring marchers to seek permission from city commission); *Staub v. City of Baxley*, 355 U.S. 313, 321, 2 L. Ed. 2d 302, 78 S. Ct. 277 (1958) (invalidating ordinance requiring labor unions to seek permit from mayor and city council for solicitation of members); *Kunz v. New York*, 340 U.S. 290, 293-94, 95 L. Ed. 280, 71 S. Ct. 312 (1951) (invalidating ordinance prohibiting public worship without permit from police commissioner); *Saia v. New York*, 334 U.S. 558, 560-61, 92 L. Ed. 1574, 68 S. Ct. 1148 (1948) (invalidating ordinance that required operators of loud-speakers and amplifiers to obtain permission from police chief); *Schneider v. State*, 308 U.S. 147, 162-64, 84 L. Ed. 155, 60 S. Ct. 146 (1939) (invalidating ordinance that banned distribution of literature without written permit from chief of police); *Lovell v. City of Griffin*, 303 U.S. 444, 450-51, 82 L. Ed. 949, 58 S. Ct. 666 (1938) (invalidating ordinance prohibiting distribution of literature without first obtaining written permission from city manager).

Because the Authority's trespass policy does not directly regulate activity protected by the First Amendment, but instead limits access to government property, I conclude that these cases are not persuasive authority to justify the defendant's facial challenge to the trespass policy. In using these cases, the majority also assumes that the trespass policy regulates pure speech instead of conduct. This approach allows a facial challenge in this case without directly addressing the admonition of the

Supreme Court of the United States that "overbreadth scrutiny has been limited with respect to conduct-related regulation." *New York v. Ferber*, 458 U.S. 747, 766, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982) (citing *Broadrick*, 413 U.S. 601, 37 L. Ed. 2d 830, 93 S. Ct. 2908).

"The traditional rule is that a person to whom a [policy] may constitutionally be applied may not challenge that [policy] on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *Ferber*, 458 U.S. at 767 (citing *Broadrick*, 413 U.S. at 610). One exception to this principle is in the arena of First Amendment overbreadth. *Ferber*, 458 U.S. at 768. However, "because of the wide-reaching effects of striking down a statute[, or trespass policy as in this case,] on its face at the request of one whose own conduct may be punished despite the First Amendment," the First Amendment overbreadth doctrine has been recognized as "strong medicine" and is employed "with hesitation, and then 'only as a last resort.'" *Ferber*, 458 U.S. at 769 (quoting *Broadrick*, 413 U.S. at 613). As explained in *Broadrick*:

> facial overbreadth adjudication is an exception to [the] traditional rules of practice and . . . its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct – even if expressive – falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.

413 U.S. at 615. Thus, the Court has held that "where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Ferber*, 458 U.S. at 770 (quotation marks omitted).

The Authority's trespass policy is found in the "Authorization" given to the Richmond Police Department to enforce the trespass laws of the Commonwealth of Virginia upon the Authority's public housing property. An individual may be banned from the Authority's property if that individual "is not a resident, employee, or such person cannot demonstrate a legitimate business or social purpose for being on the premises." After receiving either written or oral notice that he or she cannot return to the Authority's property, that person may then be arrested for trespass if he or she "either stays upon or returns" to the Authority's property.

By its terms, this policy is directed at conduct, namely trespassing, and not pure speech. *Cf. Cox v. Louisiana*, 379 U.S. 559, 581, 13 L. Ed. 2d 487, 85 S. Ct. 476 (1965) (Black, J., concurring in part and dissenting in part) ("Standing, patrolling, or marching back and forth on streets is conduct, not speech, and as conduct can be regulated or prohibited."); *Local 391 v. City of Rocky Mount*, 672 F.2d 376, 379 (4th Cir. 1982) (picketing is a hybrid of speech and conduct). The policy is not aimed at censoring particular groups or viewpoints, or prohibiting individuals from distributing leaflets on the property. Nor is it intended to prevent individuals from associating with friends or family who live in Whitcomb Court. Instead, it seeks to regulate the criminal act of trespassing that violates Code § 18.2-119. In other words, the policy's

legitimate sweep prohibits trespassing, an activity that is not protected by the First Amendment.

Because the trespass policy regulates conduct and not pure speech, I conclude that it must be "substantially overbroad" before it can be attacked through a facial challenge, and that whatever overbreadth may exist in the policy does not meet the threshold of "substantial overbreadth." "The concept of 'substantial overbreadth' is not readily reduced to an exact definition[, but] . . . the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984). Instead, this is "the paradigmatic case of a [policy] whose legitimate reach dwarfs its arguably impermissible applications." *Ferber*, 458 U.S. at 773. "Whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick*, 413 U.S. at 615-16. Thus, I find that the defendant does not have standing to assert a facial challenge to the Authority's trespass policy under the "overbreadth doctrine."

Nor do I believe that the defendant can make a facial challenge to the trespass policy under the "vagueness" doctrine. "A [defendant] who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982); *accord Parker v. Levy*, 417 U.S. 733, 756, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974); *but see Morales*, 527

U.S. at 55. The defendant's conduct when he was arrested for trespass clearly violated both the trespass policy and Code § 18.2-119. He had been previously banned from Whitcomb Court and had been given written notice that he was not to trespass on the Authority's property. Nevertheless, he entered upon the property on the day in question. There can be no question that this conduct was clearly proscribed.

Thus, I conclude that the defendant may only challenge the trespass policy as it was applied to him. Before turning to that issue, I am compelled to point out that, if a facial challenge is to be allowed in this case, it should be analyzed under the framework established by the Supreme Court for deciding when an individual's First Amendment rights have been violated by a denial of access to government property. *See United States v. Kokinda*, 497 U.S. 720, 726-27, 111 L. Ed. 2d 571, 110 S. Ct. 3115 (1990).

"The [U.S. Supreme] Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 800, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985). The first inquiry in this analysis is whether the particular activity at issue is speech protected by the First Amendment. *Id.* at 797. If it is, the nature of the forum must then be identified, "because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." *Id.* "The First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129, 69 L. Ed. 2d

517, 101 S. Ct. 2676 (1981). The final inquiry is whether the "justifications for exclusion from the relevant forum satisfy the requisite standard." *Cornelius*, 473 U.S. at 797. The defendant agrees that this analytical framework applies in this case, as reflected by his statement on brief that, "in determining whether [the Authority's trespass policy] is permissible, this Court must first define the areas affected by the regulation."

Returning to the issue regarding the constitutionality of the trespass policy as applied to the defendant, I find that the only constitutional right that the defendant could have been asserting when he entered upon the Authority's property for the purpose of bringing diapers to his son was his right of association under the Fourteenth Amendment. *See Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 544, 95 L. Ed. 2d 474, 107 S. Ct. 1940 (1987) (constitutional protection afforded to freedom of association in two distinct areas: freedom to enter into and maintain certain intimate or private relationships, and freedom to associate for purpose of engaging in protected speech or religious activities). Although the defendant argues that his conviction for trespassing violated his First Amendment rights of speech and association, and his Fourteenth Amendment right of intimate association, he was not engaged in speech or expressive association on the day in question. Thus, I conclude that the defendant's claim must be analyzed under the Fourteenth Amendment rather than the First Amendment. *See Thompson v. Ashe*, 250 F.3d 399, 406-07 (6th Cir. 2001). Consequently, it is not necessary to engage in a forum analysis, as the Court of Appeals did. As I previously explained, the first step in that analysis is whether the particular activity at issue is speech protected by the First Amendment. *Cornelius*, 473

U.S. at 797. When it is not, as in this case, then it is not necessary to determine the nature of the forum.

In determining whether the Authority's trespass policy impermissibly infringes upon the defendant's freedom of association under the Fourteenth Amendment, it is necessary to decide first whether the defendant's asserted purpose for being on the Authority's property, *i.e.*, to take diapers to his child, involved the exercise of a fundamental right. The Supreme Court has recognized a fundamental right of privacy that includes the freedom to enter into and maintain certain intimate relationships. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 383-86, 54 L. Ed. 2d 618, 98 S. Ct. 673 (1978) (constitutional protection of marriage); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85, 52 L. Ed. 2d 675, 97 S. Ct. 2010 (1977) (right to choose whether to bear children); *Moore v. City of East Cleveland*, 431 U.S. 494, 506, 52 L. Ed. 2d 531, 97 S. Ct. 1932 (1977) (right to cohabitate with certain family members); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35, 69 L. Ed. 1070, 45 S. Ct. 571 (1925) (parents' right to send children to private school); *Meyer v. Nebraska*, 262 U.S. 390, 399-400, 67 L. Ed. 1042, 43 S. Ct. 625 (1923) (parents' right to have children instructed in foreign language). However, the Court has not characterized the provision of diapers or visitation with family members as the exercise of fundamental rights. *See Thompson*, 250 F.3d at 407. Therefore, the trespass policy as applied to the defendant must be judged under the rational basis test. *See Vacco v. Quill*, 521 U.S. 793, 799, 138 L. Ed. 2d 834, 117 S. Ct. 2293 (1997) (when legislation does not burden a fundamental right, it will be upheld "so long as it bears a rational relation to some legitimate end"). Under that standard of review, the trespass policy need only be rationally related

to a legitimate governmental purpose, and the Court cannot "sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations." *Heller v. Doe*, 509 U.S. 312, 319, 125 L. Ed. 2d 257, 113 S. Ct. 2637 (1993) (quoting *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976) (*per curiam*)).

I conclude that the Authority's trespass policy passes constitutional muster under this test. The undisputed purpose of the policy is to create a safe, drug-free environment for the residents of Whitcomb Court. It cannot be questioned, in my view, that the prevention of crime in public housing is a legitimate governmental goal. *See Department of Hous. & Urban Dev. v. Rucker*, 152 L. Ed. 2d 258, 122 S. Ct. 1230, ___ U.S. ___, 152 L. Ed. 2d 258, 122 S. Ct. 1230, 1232 (2002) (recognizing "reign of terror" imposed by criminal activity in public housing). The policy of banning individuals who are not residents or employees of the Authority, or who cannot demonstrate a legitimate business or social purpose for coming onto the premises, is rationally related to, and advances, the legitimate governmental goal of preventing crime in public housing. Charging individuals with trespass when they enter upon the Authority's property after having been banned, as in the case of the defendant, also advances that goal. It must be remembered that the defendant is challenging his conviction for trespass in this appeal, not his barment from the Authority's property.

Based on the record in this case and for the stated reasons, I conclude that the defendant's arrest and conviction for trespassing did not violate his right of association afforded under the Fourteenth Amendment. Accordingly, I

would reverse the judgment of the Court of Appeals and reinstate the defendant's conviction.*

Because I agree with section III(A) of the majority opinion, I respectfully concur in part and dissent in part.

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* On brief, the defendant asserts a freedom to "loiter" based on a statement in a portion of *Morales* in which three justices joined, 527 U.S. at 53. He did not raise this specific argument before the trial court and is, therefore, precluded from doing so on appeal. *See* Rule 5:25.

KEVIN LAMONT HICKS v. COMMONWEALTH OF VIRGINIA

Record No. 1895-99-2

COURT OF APPEALS OF VIRGINIA

36 Va. App. 49; 548 S.E.2d 249; 2001 Va. App. LEXIS 466

July 3, 2001, Decided

COUNSEL:

Steven D. Benjamin (Betty Layne DesPortes; Benjamin & DesPortes, P.C., on briefs), for appellant.

Virginia B. Theisen, Assistant Attorney General (Mark L. Earley, Attorney General, on brief), for appellee.

Amicus Curiae: American Civil Liberties Union of Virginia Foundation, Inc. (Rebecca K. Glenberg, on brief), for appellant.

JUDGES:

Present: Chief Judge Fitzpatrick, Judges Benton, Willis, Elder, Bray, Annunziata, Bumgardner, Frank, Humphreys, Clements, and Agee. OPINION BY CHIEF JUDGE JOHANNA L. FITZPATRICK. Humphreys, J., with whom Willis, Bray, Bumgardner, and Agee, JJ., join, dissenting.

OPINION BY:

JOHANNA L. FITZPATRICK

OPINION:

UPON A REHEARING EN BANC

On October 17, 2000, a panel of this Court affirmed the trespass conviction of Kevin Lamont Hicks (appellant). *See Hicks v. Commonwealth*, 33 Va. App. 561, 535 S.E.2d 678 (2000). Appellant's petition for rehearing en banc was

granted and the mandate of the October 17, 2000 opinion was stayed. *See Hicks v. Commonwealth*, 34 Va. App. 42, 537 S.E.2d 616 (2000). Appellant contends the trial court erred in (1) denying his motion to dismiss the prosecution on the grounds that the barment-trespass procedure violated his First and Fourteenth Amendment rights and (2) denying his motion to remand the case to the general district court for trial before a different judge of that court and require the Commonwealth's Attorney to prosecute the case. Upon rehearing en banc, we hold that the barment-trespass procedure employed by the City of Richmond in the instant case violates the First and Fourteenth Amendments to the United States Constitution and, thus, we reverse and dismiss the trial court's conviction of appellant. The mandate of the October 17, 2000 opinion is hereby vacated.

I.

Whitcomb Court is a housing project owned by the Richmond Redevelopment and Housing Authority (RRHA). RRHA sought to "privatize" the streets surrounding and adjacent to the Whitcomb Court housing project in an effort to make the community safer.[1] On June 23, 1997 the

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[1] RRHA issued a brochure to the residents explaining the goals of street privatization:

> To make communities safer by removing persons who commit unlawful acts which destroy the peaceful enjoyment of other residents
>
> To ensure that children have places to play free of drug paraphernalia and the danger of gunshots and other criminal activity. To provide an opportunity for residents to develop safety initiatives in their community, such as resident

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City of Richmond adopted ordinance No. 97-181-197 deeding the streets surrounding Whitcomb Court to RRHA. The ordinance provided:

> § 1. That Carmine Street, Bethel Street, Ambrose Street, Deforrest Street, the 2100-2300 Block of Sussex Street and the 2700-2800 Block of Magnolia Street in Whitcomb Court . . . be and are hereby closed to public use and travel and abandoned as streets of the City of Richmond.
>
> * * *
>
> § 3. The City shall retain a full width utility easement in the streets proposed to be closed by this ordinance . . . .
>
> § 4. The City shall retain a full width right of way maintenance easement in the streets proposed to be closed by this ordinance.
>
> § 5. That the aforesaid streets shall be designated as public highways for law enforcement purposes . . . .

The streets deeded to Whitcomb Court at issue here were those streets surrounding and adjacent to the property owned by RRHA, not those contained within Whitcomb Court. Prior to "privatization," these streets were similar to all other streets in Richmond. After the streets were deeded to RRHA, red and white "private property, no trespass" signs were posted throughout

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patrols, social security number property identification, neighborhood watch, etc.

To hold households who knowingly harbor persons who engage in criminal activity accountable.

Whitcomb Court and every "hundred feet on each block," informing the public that "these streets are privatized and all the property is privatized, no trespass." The signs were "approximately 18 inches to almost 24 inches by about 12 inches." However, the streets were not gated, barricaded, or otherwise closed or restricted only to Whitcomb Court traffic. The streets remained open to vehicular traffic, and the sidewalks were open to access by the public.

After the streets were deeded to RRHA, RRHA adopted a barment-trespass procedure to prevent any "unauthorized persons" from entering the property. On November 13, 1998 the RRHA's Director of Housing Operations authorized each and every sworn officer of the Richmond Police Department to enforce the trespass laws of the Commonwealth of Virginia . . . [upon RRHA property known as] Whitcomb Court. . . . Each and every Richmond Police Department officer [is authorized] to serve notice, either orally or in writing, to any person [found on RRHA property] when such person is not a resident, employee, or such person cannot demonstrate a legitimate business or social purpose for being on the premises.

According to a printed brochure issued by RRHA to the Whitcomb Court residents, "unauthorized persons," who are subject to the barment proceedings, are all nonresidents who cannot demonstrate that they are on the premises "visiting a lawfully residing resident, or on the development conducting legitimate business."

The police officer makes the determination whether a person is to be barred, determines whether the person is a tenant or is there at the invitation of a tenant, or whether there is a legitimate reason for being on the property. A

person simply has to fail to fit within the category of people whom RRHA has deemed entitled to be on the streets and sidewalks adjacent to the public housing development to be barred. Once barred, the person who returns is a trespasser without regard to whether, on that subsequent occasion, he or she is there on legitimate business or at the invitation of a Whitcomb Court tenant.

Hicks was convicted of trespassing on the property of Whitcomb Court on February 10, 1998 and June 26, 1998, respectively, and of damaging property in Whitcomb Court on April 27, 1998.[2] On April 14, 1998, Mrs. Gloria Rogers, the housing manager at Whitcomb Court, served a written notice on Hicks advising him that he was banned from the Whitcomb Court property. He was "not to trespass on RRHA property," and if he was "seen or caught on the premises, [he would] be subject to arrest by the police." Hicks' mother, his baby, and his baby's mother live at Whitcomb Court. After receiving the notice, Hicks twice returned to Whitcomb Court to speak with Mrs. Rogers to seek permission to come back on the property. His requests were denied. On January 20, 1999, Officer James Laino (Laino) observed Hicks walking westbound in the 2300 block of Bethel Street, one of the "privatized" streets adjacent to Whitcomb Court. Laino knew that Hicks was barred from the property. Hicks explained to Laino that he was on the property "bringing pampers to his baby." During the conversation, a female came out and approached Laino and Hicks. Hicks indicated he was visiting her. Laino issued Hicks a summons for trespassing.

[2] Appellant's barment from Whitcomb Court is not related to his damaging property at Whitcomb Court.

Hicks was tried in the general district court without the presence of a Commonwealth's attorney. The district court judge conducted the questioning of Hicks. Hicks objected to this procedure. The judge struck Hicks' testimony at the end of the trial and convicted him. Hicks noted an appeal to the circuit court.

Prior to trial in the circuit court, Hicks filed a motion requesting a remand to the general district court for a new trial and an order requiring a Commonwealth's attorney to be present and to represent the Commonwealth at this new general district court trial. The circuit court denied the motion on the ground that it lacked authority to remand the trial. Hicks also moved to dismiss the charge of trespass on the ground that the RRHA's trespass policy violated the First and Fourteenth Amendments to the United States Constitution. The circuit court denied his motion to dismiss and found Hicks guilty of trespass.

II. CONSTITUTIONALITY OF RICHMOND ORDINANCE

Appellant argues that Richmond City Ordinance No. 97-181-197 and the RRHA barment-trespass procedure violate the First and Fourteenth Amendments of the United States Constitution.[3] Thus, we must determine

[3] The Commonwealth argues that appellant is barred from contesting the validity of the barment-trespass procedure because he did not present a defense to his presence on RRHA property or challenge his original barment notice or the barment-trespass procedure itself prior to being charged with trespass on January 20, 1999. Therefore the Commonwealth argues that he is improperly collaterally attacking his conviction. We disagree. Prior to his trial for this trespass charge, appellant challenged the barment-trespass procedure as

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whether the First and Fourteenth Amendments are violated by the trespass statute as enforced under authority granted by RRHA to Richmond City police officers to bar people on the streets surrounding and adjacent to Whitcomb Court and who do not fit within a narrowly defined group of people. The critical issue is whether the "privatized" streets and sidewalks are public and as such are a "traditional public forum," or whether they are "private" and, thereby, a "nonpublic forum." If they are "traditional public forum," then the barment-trespass procedure must satisfy the strict scrutiny requirement that the procedure be narrowly tailored to serve a compelling state interest. *See Daniel v. City of Tampa*, 38 F.3d 546 (11th Cir. 1994).

A. "PUBLIC FORUM"

The constitutionality of government regulation of First Amendment rights is analyzed under a public fora analysis. *See Warren v. Fairfax County*, 196 F.3d 186, 190 (4th Cir. 1999).

> The public forum analysis was created to recognize that the government must be able to limit the use of its property to the intended purpose for which the property was created and to limit access to those rightfully conducting

unconstitutional. At trial, appellant's defense to the trespass charge was that the barment-trespass procedure violated his constitutional rights and, thus, he could not be guilty of trespass because he had a constitutional right to be walking on Bethel Street. Thus, we find that appellant timely raised the issue of the validity of the barment-trespass procedure.

> business there. Toward that end, the Court has identified at least three types of fora for First Amendment purposes, each subject to a different regime of constitutional scrutiny: the traditional public forum, the designated public forum, and the nonpublic forum. The Court distinguishes between these fora based upon the physical characteristics of the property, including its location, the objective use and purposes of the property and government intent and policy with respect to the property, which may be evidenced by its historic and traditional treatment.

Id. at 190-91 (internal citations omitted). Public streets and sidewalks are repeatedly referred to as the archetype of a traditional public forum because they "are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property." *United States v. Grace*, 461 U.S. 171, 179, 75 L. Ed. 2d 736, 103 S. Ct. 1702 (1983).

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Hague v. Committee for Industrial Organization, 307 U.S. 496, 515-16, 59 S. Ct. 954, 83 L. Ed. 1423 (1939).

"Ownership [of streets and sidewalks] does not always mean absolute dominion." *Marsh v. Alabama*, 326 U.S. 501, 506, 90 L. Ed. 265, 66 S. Ct. 276 (1946) (holding that privately owned streets and sidewalks in a company owned town which are built and operated primarily to benefit the public are traditional public forums that are protected by First Amendment constitutional guarantees). In *Grace*, 461 U.S. 171, 75 L. Ed. 2d 736, 103 S. Ct. 1702, the United States Supreme Court addressed the ability of the government to redefine certain public sidewalks in front of the United States Supreme Court Building as a non-public forum. There was no separation, fence or any other indication to persons entering the sidewalks that served as the perimeter of the Court grounds that they entered a non-public forum. "The sidewalks comprising the outer boundaries of the Court grounds are indistinguishable from any other sidewalks in Washington D.C., and . . . [there is] no reason why they should be treated any differently." *Id.* at 179. The Court held that:

> "Congress[, no more than a suburban township,] may not by its own ipse dixit destroy the 'public forum' status of streets and parks which have historically been public forums. . . . " The inclusion of the public sidewalks within the scope of § 13k's prohibition, however, results in the destruction of public forum status that is at least presumptively impermissible. Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a

> forum for public expression. Nor may the government transform the character of the property by the expedient of including it within the statutory definition of what might be considered a non-public forum parcel of property.

Id. at 180 (quoting *U.S. Postal Service v. Greenburgh Civic Ass'ns*, 453 U.S. 114, 133, 69 L. Ed. 2d 517, 101 S. Ct. 2676 (1981) (quotation altered to reflect original wording).

As in *Grace*, the streets surrounding Whitcomb Court deeded to RRHA were not separated in any manner from the other streets and sidewalks in the area. The sole indication to the public that they have entered a "private" street are "red and white signs . . . approximately 18 inches to almost 24 inches by about 12 inches . . . spaced about every hundred feet on each block" and on each building indicating that "these streets are privatized and all the property is privatized, no trespass." There is no indication to the public until after they enter onto the "privatized" streets that the streets are any different from the rest of the streets in the city and are now private property. Some of the "privatized" streets are "private" for only a couple of blocks and are public on both ends of the "privatized" blocks. Thus, although the street signs declare the streets "private" and for the exclusive use of residents and those persons there on legitimate business, the streets and sidewalks continue to serve the same functions and are equally accessible to the public as before the City of Richmond passed the ordinance "privatizing" the streets.

Once a person has entered a "privatized" street he or she is subject to the barment-trespass procedure. A trespasser who receives a warning is informed that he or she is "not to trespass upon RRHA property" or "Whitcomb Court." However, the warning does not inform the person

that the streets and sidewalks surrounding the complex are a part of RRHA property.

Because the streets appear no different from other streets in Richmond and serve the same function they did prior to "privatization," "we can discern no reason why they should be treated any differently" from any other street or sidewalk. *Grace*, 461 U.S. at 179. The City of Richmond is not permitted to transform the public streets and sidewalks in Whitcomb Court into private, non-public property simply by passing an ordinance declaring them closed, conveying them to another governmental entity, the RRHA, and placing signs along the streets. *See Marsh*, 326 U.S. 501, 90 L. Ed. 265, 66 S. Ct. 276; *Grace*, 461 U.S. 171, 75 L. Ed. 2d 736, 103 S. Ct. 1702. Thus, the streets and sidewalks surrounding Whitcomb Court did not lose their public forum status when the City of Richmond deeded them to the RRHA and put some signs on the street indicating they were now private property. Hence, the barment-trespass procedure must satisfy the rigors of strict scrutiny to pass constitutional muster.

The Commonwealth argues that our prior decisions in *Collins v. Commonwealth*, 30 Va. App. 443, 517 S.E.2d 277 (1999), and *Holland v. Commonwealth*, 28 Va. App. 67, 502 S.E.2d 145 (1998), allow housing authorities to restrict access to their property and designate police officers to serve barment notices and arrest persons trespassing on housing authority property. We have previously approved a process by which police officers may be designated as agents of a housing authority to serve barment notices on persons trespassing on housing authority property, *see Collins*, 30 Va. App. at 449, 517 S.E.2d at 280; *Holland*, 28 Va. App. at 70-76, 502 S.E.2d at 146-49. However, what distinguishes this case from those is that Hicks was found

guilty of trespass for having gone upon Bethel Street and the adjacent sidewalk, whereas in both *Holland* and *Collins*, the defendants were on the non-public grounds and in the buildings of the housing authority.

The Commonwealth also contends that we should follow the Eleventh Circuit's decision in *Daniel*, 38 F.3d 546. The *Daniel* court authorized a housing authority to enforce a no trespassing policy identical to the one at issue in the instant case. However, unlike the instant case, in *Daniel*, "the City-owned streets and sidewalks surrounding and intersecting with the Housing Authority property [were] open to the public" and *Daniel* had "unlimited access to the City-owned streets and sidewalks adjacent to the housing complex." *Id.* at 548 n.3 & 550; *see also Walker v. Georgetown Hous. Auth.*, 424 Mass. 671, 677 N.E.2d 1125, 1128 (Mass. 1997) (calling into question the reasoning of the *Daniel* court and the applicability of the ruling to streets and sidewalks that were kept "open to the public"). Thus, in *Daniel*, the no trespassing policy was limited to the non-public forum consisting of the housing authority's buildings and grounds and did not include the adjacent streets and sidewalks as the RRHA policy does in the instant case. Bethel Street is a public street that was built and maintained with public funds to provide access by the public to that part of Richmond. As with all public streets and thoroughfares, historically and traditionally public streets have served as a locale for the free exchange and dissemination of ideas and have served as an area where citizens can freely and lawfully congregate or move about and exchange discourse.

The fact that legal title to the streets is transferred from a municipal government to a government agency which owns and operates a public housing development

does not change the public nature and character of the streets and sidewalks which provide access to the public to this part of the City. *See Marsh*, 326 U.S. 501, 90 L. Ed. 265, 66 S. Ct. 276. The City cannot transform the public streets surrounding Whitcomb Court into non-public streets by declaring them closed by ordinance and conveying them to another governmental entity when they continue to serve the same public purpose as before.

B. "STRICT SCRUTINY"

Therefore, the City of Richmond's and RRHA's attempt to control access to and movement upon the streets and sidewalks of the city is "subject to strict scrutiny; [it] must be narrowly tailored to serve [the] compelling state interest" of providing safe housing to the development's residents. *Daniel*, 38 F.3d at 549. The stated goal of the RRHA barment-trespass procedure is to ensure a safe environment free from criminal activity for the residents of Whitcomb Court. We agree that the City of Richmond has a compelling interest in protecting its citizens and preventing criminal activity. However, it may not, in its endeavor to control crime, pass and enforce a regulation so broad in scope that it unduly restricts or criminalizes innocent constitutionally protected behavior.

The barment-trespass procedure used in this case inhibits a person's constitutionally protected "'right to remove from one place to another according to inclination'" and the person's right to "remain in a public place of his choice." *Chicago v. Morales*, 527 U.S. 41, 53, 54, 144 L. Ed. 2d 67, 119 S. Ct. 1849 (1999) (quoting *Williams v. Fears*, 179 U.S. 270, 274, 45 L. Ed. 186, 21 S. Ct. 128 (1900)). In *Morales*, the United States Supreme Court held

that a city ordinance designed to reduce crime by criminalizing "loitering" violates the Constitution. The Court stated that "it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is 'a part of our heritage' or the right to move 'to whatsoever place one's own inclination may direct'" and the ordinance "broadly covers a significant amount" of activity that is constitutionally protected. 527 U.S. at 53-54 (internal citations omitted). The City of Richmond and RRHA barment-trespass procedure also prevents a person from standing upon the streets surrounding Whitcomb Court without a "legitimate reason." Thus, it implicates the same concerns addressed in *Morales*.

The barment-trespass procedure is not limited so as to encompass only those persons whose conduct the City and RRHA were seeking to curtail. The procedure is so broad that citizens who merely drive or walk upon one of the "privatized" streets fall within the defined group of people not authorized by the barment procedure to be upon the streets and sidewalks and, thus, may be deemed guilty of criminal conduct. A citizen need not commit a crime, intend to commit a crime or infringe upon the privacy of the residents of Whitcomb Court to be in violation of the barment-trespass statute and ordinance. The Commonwealth presented no evidence that appellant did anything other than exercise his constitutionally protected right to walk upon the streets and sidewalks of the City of Richmond. Perhaps, had Bethel Street been gated, barricaded, or physically restricted to traffic where the public was not free to travel, as with gated communities, the street could be considered non-public and not a "traditional public forum." But the City can no more "close" the streets in

Whitcomb Court and leave them open to the public, thereby purporting to make them a "non-public forum," than it could declare "closed" all streets in Richmond's troubled neighborhoods and residential areas, thereby denying access to all citizens except the residents and their invitees and others specifically approved. Neighborhood streets, such as those in Whitcomb Court, are public streets, paid for and maintained with public funds, for the use and benefit of the public.

While a public entity can restrict the use of public property or buildings to those who are using the property for its intended "non-public" purpose, such as an office building, it cannot restrict public property that is considered a "traditional public forum," such as a street or sidewalk, that is being used in a lawful way and for a lawful purpose that is constitutionally protected. *See United States v. Kokinda*, 497 U.S. 720, 727, 111 L. Ed. 2d 571, 110 S. Ct. 3115 (1990) (holding that sidewalk in front of a post office "constructed solely to provide for the passage of individuals engaged in postal business" is a non-public forum). Here, in effect, the City and RRHA, by converting the streets and sidewalks to private property, attempted to confer upon RRHA the same rights as a private property owner who may restrict everyone from coming upon the private property owner's property except the owner's tenants and the tenants' invitees, regardless of whether the invitees had done anything unlawful. However, the United States Supreme Court has held that even a private entity which owns the entire town cannot close the streets to deny the public their constitutional rights. *See Marsh*, 326 U.S. at 506. Therefore, the barment-trespass procedure at issue here is not narrowly tailored to

encompass only those activities the RRHA sought to exclude from their property.

III. CONCLUSION

Thus, we hold that Richmond's barment-trespass procedure, when strictly scrutinized, is not narrowly tailored to serve the government's compelling interest, the standard that must be met when the government attempts to regulate activity in a "traditional public forum."[4] The RRHA's privatization effort unconstitutionally infringes upon a citizen's First and Fourteenth Amendment rights to lawfully be present in a public place. Accordingly, we hold that city ordinance No. 91-181-197 [sic] as enforced through the barment-trespass procedure is unconstitutional and we reverse and dismiss appellant's conviction.[5]

Reversed and dismissed in part, reversed and remanded in part.

DISSENT BY:
Humphreys

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[4] In his petition for appeal, appellant also requested this Court to set aside the order revoking his suspended sentences on his two prior convictions for trespassing at Whitcomb Court and his prior conviction for damaging property at Whitcomb Court. However, appellant did not pursue this on brief or in oral argument. Therefore, we remand this case to the circuit court to reconsider the revocation of his suspended sentences in light of our holding in this opinion.

[5] Because we reverse on the failure of the City of Richmond to establish the constitutionality of the barment-trespass procedure, we do not address appellant's arguments regarding errors in the general district court proceedings or whether the barment-trespass procedure violated the procedural due process requirements of the Fourteenth Amendment.

DISSENT:

Humphreys, J., with whom Willis, Bray, Bumgardner and Agee, JJ., join, dissenting.

I. Constitutional Issues

I must respectfully dissent from the majority opinion, which holds that the Richmond Redevelopment and Housing Authority's (RRHA) barment proceeding and trespass policy violate the First and Fourteenth Amendments of the United States Constitution.

First, I do not agree that Hicks properly raised his objections to RRHA's barment procedures. Hicks concedes that the RRHA provided him with a barment notice on April 14, 1998. This barment notice was issued to Hicks pursuant to a valid ordinance adopted by the City of Richmond, both requiring and authorizing RRHA to take any necessary steps to "give the appearance that the closed streets . . . are no longer public streets and that they are in fact private streets." The notice, which Hicks signed in acknowledgment of its receipt, specifically prohibited Hicks from entering onto RRHA premises for any reason.

Subsequently, on at least one occasion, Hicks approached the housing manager for the Whitcomb Court property, Gloria Rogers, to request that he be able to visit his mother, a resident of that property. Rogers denied his request and again informed him that he was barred from entering the property pursuant to the barment notice. However, other than speaking to Rogers, Hicks took no steps to appeal his barment through official channels of the Authority or the courts. Instead, he ignored the barment and was arrested and convicted for trespassing, as

well as for damaging property in Whitcomb Court, prior to his arrest for the incident of January 20, 1999. In addition, for this prior trespass conviction, Hicks received a suspended sentence on the court-ordered condition that he keep the peace and be of good behavior for three years. However, Hicks continued to ignore the barment notice, as well as the court order, and trespassed again on January 20, 1999. Now, for the first time, in connection with his conviction for the January 20, 1999 trespass, Hicks argues that the barment violated his constitutional rights under the First and Fourteenth Amendments.

Hicks' arguments in this regard represent an untimely and improper collateral attack on his barment status. We have held, in the context of an habitual offender adjudication, that where a defendant has knowledge of an underlying order, never appeals the order, and subsequently violates the order, he cannot attack the underlying order in the new proceeding. *See Morgan v. Commonwealth*, 28 Va. App. 645, 507 S.E.2d 665 (1998). We based our decision in *Morgan* on *Mays v. Harris*, 523 F.2d 1258 (4th Cir. 1975), wherein the Fourth Circuit Court of Appeals held that an habitual offender who failed to appeal the underlying conviction, could not, with impunity, choose to ignore the adjudication and resulting injunction "for, . . . 'in the fair administration of justice, no man can be judge in his own case.'" *Id.* at 1259 (quoting *Walker v. Birmingham*, 388 U.S. 307, 321, 18 L. Ed. 2d 1210, 87 S. Ct. 1824 (1967) (holding that a party can be held in contempt of court for violating an injunction, even if the injunction was invalid under the Federal Constitution)).

I believe the principle advanced in *Walker, Mays* and *Morgan* is equally applicable to this case. Here, Hicks was barred from the property pursuant to authority granted

RRHA by ordinance which, in turn, provided an administrative procedure for contesting such barment. Hicks had knowledge of his barment from the property, he had been previously convicted of trespassing on the property prior to his trial for the trespassing incident of January 20, 1999, and in conjunction with that conviction, he had been ordered by the court to maintain good behavior for three years. Despite the opportunity presented by the prior court proceedings, as well as the availability of an administrative appellate procedure, Hicks raised no objection to the propriety of the barment until his trial for the January 20, 1999 incident. Pursuant to the principles set forth in the above-cited cases, I do not believe Hicks should be allowed to have bypassed "orderly judicial review of [the barment and his prior trespassing convictions] before disobeying [them]." *Walker*, 388 U.S. at 320.

I would also reject Hicks' challenges to the constitutionality of RRHA's policy. "In assessing the constitutionality of a statute or ordinance, courts must presume that the legislative action is valid. Consequently, the burden is on the challenger to demonstrate the constitutional defect." *Coleman v. City of Richmond*, 5 Va. App. 459, 462, 364 S.E.2d 239, 241 (1988). I would hold that Hicks failed to meet this burden.

Hicks essentially argues, on brief and orally, that because the streets of Whitcomb Court were once public streets and sidewalks owned by the City of Richmond, any statute restricting his presence thereon is unconstitutionally overbroad or vague. Hicks further alleges that because the policy is overbroad and vague, it impinges upon his First Amendment guarantees of free speech and implied guarantee of free association, as well as his Fourteenth Amendment due process protections.

"Generally, a litigant may challenge the constitutionality of a law only as it applies to him or her." *Id.* at 463, 364 S.E.2d at 241. "The traditional rule is that a person to whom a [policy] may be constitutionally applied may not challenge that [policy] on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York v. Ferber*, 458 U.S. 747, 769, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982). Yet,

> what has come to be known as the First Amendment overbreadth doctrine is one of the few exceptions to this principle and must be justified by weighty countervailing policies. The doctrine is predicated on the sensitive nature of protected expression . . . [and] it is for this reason that we have allowed persons to attack overly broad statutes even though the conduct of the person making the attack is clearly unprotected and could be proscribed by a law drawn with the requisite specificity.

Id. The United States Supreme Court has also allowed a facial attack on the grounds of vagueness even though the litigant's own speech was unprotected. *See Kolender v. Lawson*, 461 U.S. 352, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983).

Nevertheless, "where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the [policy's] plainly legitimate sweep." *Ferber*, 458 U.S. at 770. This distinction is ignored by the majority. "We have never held that a [policy] should be invalid on its face merely because it is possible to conceive of a single impermissible application . . . ." *Id.* at 771. Instead, "in a facial challenge to the overbreadth and vagueness of a law, a

court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Houston v. Hill*, 482 U.S. 451, 458, 96 L. Ed. 2d 398, 107 S. Ct. 2502 (1987).

A policy will be deemed unconstitutionally overbroad if it is "one that is designed to burden or punish activities which are not constitutionally protected, but the [policy] includes within its scope activities which are protected by the First Amendment." *Parker v. Commonwealth*, 24 Va. App. 681, 690, 485 S.E.2d 150, 154-55 (1997). A policy will be deemed unconstitutionally vague if "it does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Santillo v. Commonwealth*, 30 Va. App. 470, 482, 517 S.E.2d 733, 739 (1999) (citation omitted).

It is axiomatic that in making such a determination, an appellate court should refrain from speculation outside of the record before it. Here, contrary to Hicks' argument, the policy clearly does not bar individuals from freely associating with their friends or loved ones living on RRHA property, nor does it prohibit persons from exercising free expression. Further, the policy does not automatically delineate every non-resident who uses a sidewalk owned by RRHA to be a trespasser, as suggested by the majority. Instead, it merely authorizes the Richmond police, as agents of the RRHA, to ban persons from the property who enter upon the property without permission

from a resident or the RRHA. Significantly, any unauthorized individuals are not automatically arrested, but they are warned that they are not to enter the property in the future.[4] Further, those who have been formally banned from the property are not without recourse and can request, through the proper RRHA channels, to have the ban removed.

Thus, I would consider this policy as a "paradigmatic case of [one] whose legitimate reach dwarfs its arguably impermissible applications." *Ferber*, 458 U.S. at 773. Under these circumstances, I would find that the policy is not "substantially overbroad" and/or vague and that "whatever overbreadth [or vagueness] may exist should be cured through a case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973).

The majority has found that the Whitcomb Court property is a traditional public forum simply because the property in question is a sidewalk adjoining a street constructed and once owned by the City of Richmond. However, neither the evidence in this record nor the precedents of the United States Supreme Court compel such a finding. I agree that "the Supreme Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of

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[4] Contrary to the majority's statement otherwise, Hicks presented no evidence suggesting that the warning does not inform persons that the streets and sidewalks surrounding the complex are part of RRHA property.

those wishing to use the property for other purposes. Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum." *Paff v. Kaltenbach*, 204 F.3d 425, 431 (3rd Cir. 2000) (citing *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 800, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985)). However, "when the relevant public property is determined to be a 'non-public forum,' rather than an 'open forum' or a 'designated forum,' the government has greater freedom to restrict speech." *Id.*

A traditional public forum is property which has the physical characteristics of a public thoroughfare, which has the objective use and purpose of open public access or some other objective use and purpose inherently compatible with expressive conduct, and by which history and tradition has been used for expressive conduct. *See Warren v. Fairfax County*, 169 F.3d 190, 198 (4th Cir. 1999) (Murnaghan, J., dissenting), adopted and incorporated by reference by the majority in *Warren v. Fairfax County*, 196 F.3d 186, 191 (4th Cir. 1999) (*en banc*). As the majority also correctly points out, a sidewalk adjoining a public street will generally fall into this category. *See Frisby v. Schultz*, 487 U.S. 474, 481, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988). However, the sidewalk at issue here is not the "quintessential" public sidewalk which has been "immemorially held in trust for the use of the public," or which has been traditionally "used for public assembly and debate, the hallmarks of a traditional public forum." *See Frisby*, 487 U.S. at 480-81; *see also United States v. Grace*, 461 U.S. 171, 179-80, 75 L. Ed. 2d 736, 103 S. Ct. 1702 (1983) (instructing that it is incorrect to assert that every "public sidewalk" is a public forum).

While it is true that the City of Richmond cannot transform public streets and sidewalks into private, non-public property simply by passing an ordinance declaring them private or closed property, this is but one factor to consider in determining the nature of the sidewalks at issue. *See Marsh v. Alabama*, 326 U.S. 501, 90 L. Ed. 265, 66 S. Ct. 276 (1946); *see also United States v. Kokinda*, 497 U.S. 720, 727, 111 L. Ed. 2d 571, 110 S. Ct. 3115 (1990). Moreover, contrary to the majority's conclusion, "the mere physical characteristics of the property cannot dictate forum analysis." *Kokinda*, 497 U.S. at 727. Instead, we must also consider the location and purpose of the sidewalk, in order to determine its character as public or private. *See id.* at 728-29.

I agree with the majority that a "critical issue" is also whether the privatized streets continue in their previous character as a traditional public forum. However, contrary to the majority, I would find that neither the purpose, the treatment, nor the physical characteristics of the Whitcomb Court sidewalks support the majority's conclusion that they fall within the parameters of a traditional public forum.

First, the Whitcomb Court property, including its streets and sidewalks, has been deeded from the City to the RRHA. Although ignored by the majority, a condition for the closure of the streets by the City required RRHA to "make provisions to give the appearance that the closed streets, particularly at the entrances, [were] no longer public streets and that they [were] in fact, private streets." In order to meet this requirement, although the streets and sidewalks of the development were not physically barricaded, RRHA posted red and white signs, "approximately 18 inches to almost 24 inches by about 12 inches"

in size, on each side of the buildings, as well as on the streets of the property, on each block, about every 100 feet. These signs clearly indicated that the streets and sidewalks had been privatized and that trespassing was prohibited.[7] The record further indicates that RRHA held meetings with residents and provided pamphlets explaining the privatization. The pamphlet encouraged residents to explain the privatization to their neighbors and guests in order to facilitate the change. Finally, for at least a year prior to Hicks' present arrest, RRHA and the Richmond police treated the property as private property by determining whether visitors were authorized and by banning unauthorized persons from the property.

In concluding that "there is no indication to the public until after they enter onto the 'privatized' streets that [they] are any different from the rest of the streets in the city," the majority both improperly assumes a fact-finding function outside the record in this case and improperly shifts the burden of proof concerning the character of the forum away from Hicks. A review of the character of the "privatized" streets and sidewalks, restricted to the record of the trial court, reveals that other than exceptions for school buses, delivery trucks, city service vehicles and law enforcement, there is absolutely no evidence that the streets and/or sidewalks of the Whitcomb Court property remained open to a public flow of traffic, as the majority suggests. Furthermore, even though sidewalks "may be

[7] Officer Llaino testified to the size, number and location of the signs and that the substance of the message on the signs was that "all the property had been privatized and that trespassing was prohibited." This evidence was uncontradicted.

open to the public, [that] fact alone does not establish that such areas must be treated as traditional public fora under the First Amendment." *Kokinda*, 497 U.S. at 729.

Thus, given the clear intent by the City of Richmond to remove the streets of Whitcomb Court from the category of thoroughfares available for use by the general public and given the notice to the residents and the public at large in the form of repeated and obvious signage that the streets and sidewalks were no longer "public" in character, I would hold that the restrictions imposed by RRHA must be analyzed under the test for non-public property: they must be reasonable and "not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* at 730 (citing *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983)).

There is no dispute here that the stated purpose for RRHA's trespassing enforcement effort, which was to "provide a safe environment for citizens in a place often used to sell drugs," is reasonable and legitimate. In fact, we have previously upheld the delegation of authority by a public housing complex to police officers to bar unauthorized individuals from the property for the purpose of preventing crime, protecting property and preserving the peace. *See Holland v. Commonwealth*, 28 Va. App. 67, 502 S.E.2d 145 (1998).

Moreover, as stated above, the record is clear that a person is not considered "unauthorized" until he or she has entered the property without the permission of either a resident or an RRHA official. Even then, and notwithstanding numerous and obvious signs that acquaint anyone able to read that the character of the property is

private and not public, unless the individual is engaged in some type of criminal activity, that individual is not formally barred from the property until after he or she has been warned not to enter the property without permission. Once an individual is barred from the property, a procedure is available to request removal of the barment. Further, Hicks produced no evidence that either RRHA or the Richmond police have ever banned any form of expression based on its content.

Based on this record, I would find that any potential interference with an individual's right of expression and/or intimate association with residents of Whitcomb Court, or to "loiter" on the property, which, although publicly owned, in my judgment constitutes a "non-public forum" for First Amendment purposes, is reasonable, limited and justified to achieve the legitimate purpose of protecting these residents from crime. Therefore, I would hold that Hicks' conduct at the time of his arrest - namely, knowingly trespassing on private property - was not constitutionally protected.

II. Motion to Remand

Because I would hold that RRHA's barment proceeding and trespass policy with respect to Hicks do not violate the First and Fourteenth Amendments, I would address the remaining assignment of error.

Hicks argues that he was entitled to have his case remanded to the general district court for a new trial before another judge because the judge of that court who presided over the initial trial improperly assumed the role of a prosecutor by "cross-examining" him.

The Supreme Court of Virginia has long held that there is no inherent damage to a fair trial when a judge asks questions of a witness.

> [A] trial judge [may] ask questions of a witness either on his examination in chief or on cross-examination. The practice is common and perfectly permissible. Indeed, there are times when it is his duty to do so. He is not to sit there and see a failure of justice on account of omissions to prove facts plainly within the knowledge of a witness, but the character of his questions should not be such as to disclose bias on his part, or to discredit the truthfulness of the witness. "For the purpose of eliciting evidence which has not otherwise been brought out, it is proper for the judge to put the questions to a witness either on his examination in chief or on his cross-examination, and where anything material has been omitted, it is sometimes his duty to examine a witness."

Mazer v. Commonwealth, 142 Va. 649, 655, 128 S.E. 514, 516 (1925) (citations omitted).

In addition, we have held that "the trial court, in the exercise of its sound discretion, may permit jurors to submit written questions to be asked of a witness." *Williams v. Commonwealth*, 24 Va. App. 577, 582, 484 S.E.2d 153, 155 (1997). We also noted in *Williams* that "the function of a jury is to assure a fair and equitable resolution of all factual issues. The jury serves as the final arbiter of the facts, 'charged with weighing the evidence, judging the credibility of the witnesses, and reaching a verdict' in the case." *Id.* at 582, 484 S.E.2d at 155. This function belongs no less to the court when serving as the fact finder. We need not determine here whether the general district court judge's questions demonstrated an

inappropriate bias or prejudice because the court granted Hicks' motion to strike the questions as well as his answers.

In addition, the remedy provided to any defendant in a criminal case who perceives error on the part of a trial court is to exercise the right to appeal the matter to a higher tribunal. In the context of misdemeanors tried in the district courts, the General Assembly has established a right to a trial de novo in the circuit court.[8] A de novo hearing means a trial anew. On appeal, a conviction in the district court is annulled, and a new trial is held in the circuit court. *See Ledbetter v. Commonwealth*, 18 Va. App. 805, 447 S.E.2d 250 (1994).

While it would clearly be preferable and in its interest for the Commonwealth to be represented by counsel in every case in which it is a party, the General Assembly has declined to mandate such representation. Code § 15.2-1627(B) recites the duties of Commonwealth's Attorneys and their assistants.[9] This statute only requires Commonwealth's Attorneys to prosecute felonies and provides that

[8] Code § 16.1-136 provides in pertinent part: "Any appeal taken under the provisions of this chapter shall be heard de novo in the appellate court and shall be tried without formal pleadings in writing; and, . . . the accused shall be entitled to trial by a jury in the same manner as if he had been indicted for the offense in the circuit court."

[9] Code § 15.2-1627(B) provides in pertinent part: "The attorney for the Commonwealth . . . shall have the duties and powers imposed upon him by general law, including the duty of prosecuting all warrants, indictments or informations charging a felony, and he may in his discretion, prosecute Class 1, 2 and 3 misdemeanors, or any other violation, the conviction of which carries a penalty of confinement in jail, or a fine of $ 500 or more, or both . . . ."

a prosecutor "may in his discretion, prosecute Class 1, 2 and 3 misdemeanors." Thus, the General Assembly decided as a matter of policy to place the discretion for the representation of the Commonwealth in misdemeanor cases in the hands of the executive branch rather than the judicial branch of government.

Hicks relies on the decision of the Supreme Court of the United States in *Ward v. Village of Monroeville*, 409 U.S. 57, 34 L. Ed. 2d 267, 93 S. Ct. 80 (1972), as authority for his argument that a trial de novo does not cure errors committed in a lower court. I find his reliance on *Ward* is misplaced. In *Ward*, the Supreme Court addressed a systemic problem of bias inherent in the infrastructure of local mayors' courts. There, mayors of villages sat as judges in the courts, and a major portion of village income was derived from the collection of these fines. In finding that such a scheme violates the due process rights of criminal defendants in the mayors' courts, Justice Brennan noted that the constitutional infirmity was grounded in the separation of powers doctrine.

> Although "the mere union of the executive power and the judicial power in him cannot be said to violate due process of law," the test is whether the mayor's situation is one "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused." Plainly that "possible temptation" may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court.

Id. at 60 (citations omitted).

Hicks does not allege, nor do I find, such systemic bias in the procedural structure of the district courts in the Commonwealth. Thus, assuming without deciding that the questions propounded by the general district court judge constituted error, I would hold that the trial de novo in the circuit court provided an adequate remedy.

For all of these reasons, I dissent and would affirm the judgment of the trial court.

KEVIN LAMONT HICKS v. COMMONWEALTH OF VIRGINIA

Record No. 1895-99-2

COURT OF APPEALS OF VIRGINIA

33 Va. App. 561; 535 S.E.2d 678; 2000 Va. App. LEXIS 780

October 17, 2000, Decided

COUNSEL:

Steven D. Benjamin (Betty Layne DesPortes; Benjamin & DesPortes, P.C., on briefs), for appellant.

Virginia B. Theisen, Assistant Attorney General (Mark L. Earley, Attorney General, on brief), for appellee.

JUDGES:

Present: Judges Coleman, Humphreys and Senior Judge Overton. OPINION BY JUDGE ROBERT J. HUMPHREYS. Coleman, J., concurring, in part, and dissenting, in part.

OPINION BY:

ROBERT J. HUMPHREYS

OPINION:

OPINION BY JUDGE ROBERT J. HUMPHREYS

Kevin Lamont Hicks appeals his conviction in a trial de novo appeal to the circuit court (trial court) for trespass. Hicks complains that 1) the trial court erred in denying his motion to remand the case to the general district court with instructions for the matter to be tried before a different judge of that court and for the Commonwealth's Attorney to prosecute the case in that forum; 2) the trial court erred in denying his motion to dismiss the prosecution on the grounds that his due process and First

Amendment rights were violated; and 3) the trespassing statute is unconstitutionally vague and overbroad. We disagree and for the reasons that follow, affirm his conviction.

I. Background

Previous to January 20, 1999, Hicks had been convicted of trespassing on the property of Whitcomb Court on February 10, 1998, and June 26, 1998, respectively, and of damaging property there on April 27, 1998.

Whitcomb Court is a housing project owned by the Richmond Redevelopment and Housing Authority ("Authority"). The City of Richmond, by ordinance, deeded certain city streets including the 2300 block of Bethel Street, to the Authority for the express purpose of privatizing and closing them to traffic by non-residents. "No Trespassing" signs were placed at intervals on the privatized streets. The Authority authorized the Richmond Police Department to enforce the trespass statute on its property, including Whitcomb Court. On April 14, 1998, Mrs. Gloria Rogers, housing manager at Whitcomb Court, personally served a written notice on Hicks advising him that he was banned from the Whitcomb Court property. This notice specifically advised Hicks that if he were "seen or caught on the premises, [he would] be subject to arrest by police." Hicks acknowledged receipt by signing a copy of the notice. On two occasions after receiving the notice, Hicks went to Mrs. Rogers and sought permission to come back on the property. He told Mrs. Rogers that his mother lived there. His barment from the property was not lifted.

On January 20, 1999, Officer James Laino observed Hicks walking in the 2300 block of Bethel Street. Officer

Laino had personal knowledge that Hicks was barred from the property and had arrested him previously for trespassing. Hicks told Laino that he was there "to bring pampers for his baby." Laino issued Hicks a summons for trespassing.

Hicks was tried in general district court on the trespassing summons on April 21, 1999. Hicks was represented by counsel. No prosecutor was present on behalf of the Commonwealth.

Officer Laino testified and responded to questions by the court and was cross-examined by counsel for Hicks.[1] Hicks then testified on his own behalf. Following direct examination, the court propounded several questions to which counsel for Hicks objected. Counsel for Hicks moved to strike Hicks' "testimony in totality." The court granted this motion. The defendant was convicted in general district court and noted his appeal to the circuit court.

Prior to trial in the circuit court, Hicks filed a motion asking the circuit court to remand the case for a new trial in the general district court before a different judge and with direction to the Commonwealth's Attorney that his office represent the Commonwealth in the new trial. At the hearing on his motion, Hicks asked that, in the alternative to granting his motion to remand, the case be

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[1] The transcript of the trial in the general district court identifies the witness as "Officer James Hannah." Although the discrepancy is not fully explained in the record, it appears that this witness was actually the same Officer James Laino who issued the summons and testified in the circuit court.

dismissed. The circuit court denied the motion on the grounds that it lacked any authority to grant it.

Also prior to trial, Hicks moved to dismiss the charge on the ground that the Authority's trespass policy violates the federal and state constitutions. At a hearing on this motion, Mrs. Rogers testified as to the trespass policy at Whitcomb Court. Through Rogers, a flyer was introduced into evidence which the Authority gave to residents and which described the privatization of the streets in the housing complex. This flyer stated and Rogers confirmed in her testimony that non-residents who have not been barred from the property and who can demonstrate that they have been invited by a resident are not affected by the trespassing policy. Rogers also testified that the open-air drug market in the area was the reason for much of the policy toward trespassers and that it is usually a member of the police department who gives the notice and warning. Mrs. Rogers testified that criminal acts on the premises, including those involving drugs or domestic violence, were grounds for barment. She further testified that the police were authorized to warn non-residents to leave the property if they could not demonstrate that they were invited by a resident and to bar them from returning. Additionally, Mrs. Rogers indicated there was a process for having a barment lifted by submitting a written request through the Authority's director of housing operations. She also testified that any organization that seeks to use a privatized street must get permission first and requests to hold functions or pass out materials on the privatized streets are referred to a "community council." She testified that she had not denied permission to anyone who had sought to pass out flyers on the complex property.

The motion to dismiss on constitutional grounds was denied, and Hicks was subsequently tried de novo in a bench trial and convicted of trespassing.

II. Motion for Remand

Hicks first argues that he was entitled to have his case remanded to the general district court for a new trial before another judge because the judge of that court who presided over the initial trial improperly assumed the role of a prosecutor by "cross-examining" him.

The Supreme Court of Virginia has long held that there is no inherent damage to a fair trial when a judge asks questions of a witness.

> [A] trial judge [may] ask questions of a witness either on his examination in chief or on cross-examination. The practice is common and perfectly permissible. Indeed, there are times when it is his duty to do so. He is not to sit there and see a failure of justice on account of omissions to prove facts plainly within the knowledge of a witness, but the character of his questions should not be such as to disclose bias on his part, or to discredit the truthfulness of the witness. "For the purpose of eliciting evidence which has not otherwise been brought out, it is proper for the judge to put the questions to a witness either on his examination in chief or on his cross-examination, and where anything material has been omitted, it is sometimes his duty to examine a witness."

Mazer v. Commonwealth, 142 Va. 649, 655, 128 S.E. 514, 516 (1925) (citations omitted).

In addition, we have held that "the trial court, in the exercise of its sound discretion, may permit jurors to submit written questions to be asked of a witness." *Williams v. Commonwealth*, 24 Va. App. 577, 582, 484 S.E.2d 153, 155 (1997). We also noted in *Williams* that "the function of a jury is to assure a fair and equitable resolution of all factual issues. The jury serves as the final arbiter of the facts, 'charged with weighing the evidence, judging the credibility of the witnesses, and reaching a verdict' in the case." *Id.* at 582, 484 S.E.2d at 155. This function belongs no less to the court when serving as the fact finder. We need not determine here whether the general district court judge's questions demonstrated an inappropriate bias or prejudice because the court granted Hicks' motion to strike the questions as well as his answers.

In addition, the remedy provided to any defendant in a criminal case who perceives error on the part of a trial court is to exercise the right to appeal the matter to a higher tribunal. In the context of misdemeanors tried in the district courts, the General Assembly has established a right to a trial de novo in the circuit court.[2] A de novo hearing means a trial anew. On appeal, a conviction in the district court is annulled, and a new trial is held in the circuit court. *See Ledbetter v. Commonwealth*, 18 Va. App. 805, 447 S.E.2d 250 (1994).

[2] Code § 16.1-136 provides in pertinent part: "Any appeal taken under the provisions of this chapter shall be heard de novo in the appellate court and shall be tried without formal pleadings in writing; and, . . . the accused shall be entitled to trial by a jury in the same manner as if he had been indicted for the offense in the circuit court."

While it would clearly be preferable for the Commonwealth to be represented by counsel in every case in which it is a party, the General Assembly has declined to mandate such representation. Code § 15.2-1627(B) recites the duties of Commonwealth's Attorneys and their assistants.[3] This statute only requires Commonwealth's Attorneys to prosecute felonies and provides that a prosecutor "may in his discretion, prosecute Class 1, 2 and 3 misdemeanors." Clearly, the General Assembly decided as a matter of policy to place the discretion for the representation of the Commonwealth in misdemeanor cases in the hands of the executive branch rather than the judicial branch of government.

Hicks relies on the decision of the Supreme Court of the United States in *Ward v. Village of Monroeville*, 409 U.S. 57, 34 L. Ed. 2d 267, 93 S. Ct. 80 (1972), as authority for his argument that a trial de novo does not cure errors committed in a lower court. We find his reliance on Ward is misplaced. In Ward, the Supreme Court addressed a systemic problem of bias inherent in the infrastructure of local mayors' courts. There, mayors of villages sat as judges in the courts, and a major portion of village income was derived from the collection of these fines. In finding that such a scheme violates the due process rights of criminal defendants in the mayors' courts, Justice Bren-

[3] Code § 15.2-1627(B) provides in pertinent part: "The attorney for the Commonwealth . . . shall have the duties and powers imposed upon him by general law, including the duty of prosecuting all warrants, indictments or informations charging a felony, and he may in his discretion, prosecute Class 1, 2 and 3 misdemeanors, or any other violation, the conviction of which carries a penalty of confinement in jail, or a fine of $ 500 or more, or both . . . "

nan noted that the constitutional infirmity was grounded in the separation of powers doctrine.

> Although "the mere union of the executive power and the judicial power in him cannot be said to violate due process of law," the test is whether the mayor's situation is one "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused." Plainly that "possible temptation" may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court.

Id. at 60 (citations omitted).

Hicks does not allege, nor do we find, such systemic bias in the procedural structure of the district courts in the Commonwealth. Thus, assuming without deciding that the questions propounded by the general district court judge constituted error, we find that the trial de novo in the circuit court provided an adequate remedy.

III. First Amendment

Hicks asserts that the Authority's trespass policies violate his First Amendment right to freedom of association under the constitutions of the United States and the Commonwealth of Virginia.

Hicks was charged with violating Code § 18.2-119, which provides in pertinent part that "if any person without authority of law goes upon or remains upon the lands, buildings or premises of another, or any portion or

area thereof, after having been forbidden to do so . . . [or] after having been forbidden to do so by a sign or signs posted . . . shall be guilty of a Class 1 misdemeanor."

Hicks concedes that he had been forbidden to come onto the Whitcomb Court property and admits he did so notwithstanding his barment. Furthermore, he apparently took no steps to appeal his barment through official channels of the Authority or the courts. Instead, Hicks argues that, notwithstanding the privatization of the street where he was cited, it was public property constituting a "public forum" under the holding of *Marsh v. Alabama,* 326 U.S. 501, 90 L. Ed. 265, 66 S. Ct. 276 (1946). We disagree. First, the Supreme Court of Virginia has specifically held that the trespass statute applies to publicly owned property. *See, e.g., Johnson v. Commonwealth,* 212 Va. 579, 186 S.E.2d 53 (1972); *Jordan v. Commonwealth,* 207 Va. 591, 151 S.E.2d 390 (1966); *Miller v. Harless,* 153 Va. 228, 149 S.E. 619 (1929). In addition, we have held that an alleyway, which has been vacated by municipal ordinance and marked with "No Trespassing" signs, is not "intended for public use." *Miller v. Commonwealth,* 10 Va. App. 472, 475, 393 S.E.2d 431, 433 (1990).

"The extent to which the Government can control access depends on the nature of the relevant forum." *United States v. Kokinda,* 497 U.S. 720, 726, 111 L. Ed. 2d 571, 110 S. Ct. 3115 (1990). Regulation of a non-public forum requires only reasonableness and "not an effort to suppress expression merely because public officials oppose the speaker's view. Indeed, control over access to a non-public forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Id.* at 730 (citations omitted).

The Attorney General cites *Daniel v. City of Tampa*, 38 F.3d 546 (11th Cir. 1994), *cert. denied*, 515 U.S. 1132, 132 L. Ed. 2d 811, 115 S. Ct. 2557 (1995). The *Daniel* court considered the constitutionality of a Florida trespass-after-warning statute in the context of the property of the Tampa Housing Authority. There, as here, the stated rationale for the trespassing enforcement effort was to "provide a safe environment for citizens" in a place often used to sell drugs. *Daniel*, 38 F.3d at 548.

In concluding that the Tampa Housing Authority property was a non-public forum, the *Daniel* court found that the restriction on access was content neutral and reasonable and that Florida's trespass statute was not vague or overbroad. We find the *Daniel* analysis, applying *Kokinda*, to be persuasive. The Authority's trespass policy serves a reasonable purpose and is content neutral. Once a person is barred, the person is subject to arrest if he or she returns to the property. We have previously upheld the delegation of authority by a public housing complex to police officers to bar unauthorized individuals from the property for the purpose of preventing crime, protecting property and preserving the peace. *See Holland v. Commonwealth*, 28 Va. App. 67, 502 S.E.2d 145 (1998).

Hicks also argues that the street privatization and trespassing enforcement policy infringes on his freedom to associate. We have previously noted that, although the First Amendment does not explicitly protect a "right of association," the Supreme Court of the United States has recognized such a right in two circumstances, "intimate association" and "expressive association." *See Collins v. Commonwealth*, 30 Va. App. 443, 517 S.E.2d 277 (1999). Hicks asserts that his right to intimate human relationships is infringed by the Authority's policy. In *Collins*, we

held that "the liberty interest in intimate association is rooted in the necessity of affording 'certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State.'" *Collins*, 30 Va. App. at 452, 517 S.E.2d at 281 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 618-19, 82 L. Ed. 2d 462, 104 S. Ct. 3244 (1984)) (emphasis added).

The only evidence in the record of Hicks' "intimate associations" in Whitcomb Court are his statement to Officer Laino that he was "bringing pampers to his baby" and his statement to Mrs. Rogers that his mother lived there. Assuming without deciding that this evidence constitutes a sufficient showing that Hicks' right to association is implicated by the Authority's trespassing policy, we consider whether the policy constitutes an unjustified interference with such intimate familial associations.

As already noted, the policy serves a reasonable public safety purpose. Hicks was not a resident of Whitcomb Court. There is no evidence before us that Hicks was invited to the complex. The trespassing policy contains procedures for a resident to secure permission for a guest to come onto the Authority's property but the record is silent as to any efforts to comply with such procedure. Hicks was previously convicted of repeated criminal acts committed on the property. Any interference in Hicks' right to intimately associate with residents of Whitcomb Court caused by his barment is limited to Authority property which, as already stated, though publicly owned, constitutes a "non-public forum" for First Amendment purposes. We find on these facts that to the extent Hicks' barment from the property interfered with his right to "intimate association" with residents of Whitcomb Court, such interference was reasonable, limited and justified.

IV. Trespass Statute

Finally, Hicks challenges the trespassing statute as unconstitutionally vague and further, that it is unconstitutionally overbroad. We note, however, that while he attacks the statute on these dual grounds, his arguments focus instead on the Authority's policies.

"A penal statute is unconstitutionally void-for-vagueness if it does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Santillo v. Commonwealth*, 30 Va. App. 470, 482, 517 S.E.2d 733, 739 (1999) (citation omitted).

Code § 18.2-119 is by no means complex or difficult for one of ordinary intelligence to comprehend. It punishes those who enter upon or remain upon the property of another after having been forbidden to do so by posted sign or personal admonishment. We do not find this statute unconstitutionally vague, either on its face or as applied to Hicks.

We turn now to Hicks' argument that the trespassing statute is unconstitutionally overbroad.

> A statute may be overbroad if it "is one that is designed to burden or punish activities which are not constitutionally protected, but the statute includes within its scope activities which are protected by the First Amendment." Overbreadth is a doctrine whose reach dissipates when a statute proscribes primarily conduct and not speech. If a penal statute proscribes both conduct and speech, "the overbreadth of the statute must . . .

> be substantial . . . in relation to the statute's plainly legitimate sweep."

Parker v. Commonwealth, 24 Va. App. 681, 690, 485 S.E.2d 150, 154-55 (1997) (citations omitted).

"There must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court for [the statute] to be facially challenged on overbreadth grounds." *Id.* (citing *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800-01, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984) (citation omitted) (footnote omitted)).

We do not find Code § 18.2-119 to be overbroad. The legitimate purpose of the statute is to punish conduct, not protected speech. It applies only on private or non-public property. The statute requires prior notice be given to those implicated by its reach. We do not find that the statute imposes a substantial burden on constitutionally protected conduct nor do we find any realistic danger that the First Amendment rights of parties not before the court will be significantly compromised.

For all of these reasons, we affirm the decision of the trial court.

Affirmed.

CONCUR BY:
Coleman (In Part)

DISSENT BY:
Coleman (In Part)

DISSENT:

Coleman, J., concurring, in part, and dissenting, in part.

I concur with Part II of the majority opinion which holds that the circuit court did not err by refusing to remand the case to the general district court. However, I disagree with the majority's holdings that Richmond Redevelopment and Housing Authority's (RRHA's) barment proceeding and "trespass policy" do not violate the First Amendment and the due process clause of the Fourteenth Amendment of the United States Constitution.

I disagree with the majority's conclusion that the barment procedure and trespass statute, as applied in this case, restrict conduct in a "non-public forum," which consists of private streets and sidewalks of a public housing development. In my opinion, the streets and sidewalks of Whitcomb Court are public property open to travel by the public at large and, as such, are a "traditional public forum." Accordingly, any effort by the City of Richmond to control constitutionally protected conduct in a traditional public forum must pass a strict scrutiny test. In my opinion, because the barment procedure and trespass statute infringed on Hicks' right to move freely and to be present in a "traditional public forum," the barment-trespass proceeding violates the First and Fourteenth Amendments. Accordingly, I dissent from those holdings.

The City of Richmond, in an effort to make certain of its streets "private" property, passed an ordinance which authorized deeding those streets to RRHA. After the streets were deeded to RRHA, "No Trespass" signs were posted throughout Whitcomb Court, stating that the property and streets are private property. However, the

streets are not gated, barricaded, or otherwise closed or restricted only to Whitcomb Court traffic. The streets remain open to vehicular traffic and the sidewalks are open to access by the public. RRHA's stated goal for "privatization" of the streets was to make the community safer by removing persons from the housing development who commit unlawful acts, particularly involving drugs and firearms; to provide a better opportunity for residents of the community to develop safety initiatives, such as resident patrols and neighborhood watch; and to hold residents accountable for knowingly harboring criminals.

Although the Richmond City ordinance and deed conveying the streets and sidewalks to RRHA purport to make them private property, both documents specifically provide that the streets "shall be designated as public highways for law enforcement purposes in accordance with Virginia Code Section 46.2-1307 . . . and that the City shall retain a full width right of way maintenance easement in the streets." After the City executed the "privatization" deed, RRHA's Director of Housing signed a written "authorization" implementing the barment proceedings. The authorization provided that "each and every Richmond Police Department officer [was authorized] to serve notice, either orally or in writing," forbidding any person from returning to the property if such person could not demonstrate that he or she was a resident or employee, or that he or she was there for a legitimate business or social purpose. According to a printed brochure issued by RRHA to the Whitcomb Court residents, "unauthorized persons," who are subject to the barment proceedings, are all non-residents who cannot demonstrate that they are on the premises "visiting a lawfully residing resident, or on the development conducting legitimate business."

The police officer, who decides whether the person is to be barred, determines whether the person is a tenant or is there at the invitation of a tenant, or whether the reason for being there is legitimate. Thereafter, once a person is barred, he or she is subject to being prosecuted for trespass for being on the streets or sidewalks in Whitcomb Court even if the person is subsequently there at the invitation of a tenant or there on legitimate business. Thus, to be barred from Whitcomb Court, one does not have to be guilty of a crime in Whitcomb Court or to have done anything wrong, but rather, one simply has to fail to fit within the category of people who RRHA has deemed entitled to be on the streets and sidewalks in the public housing development. Once barred, the person who returns is a trespasser without regard to whether, on that subsequent occasion, he or she is there on legitimate business or at the invitation of a Whitcomb Court tenant.

The City is entitled, and is in fact required within constitutional limits, to control its streets and sidewalks so as to make them safe and to control crime thereon. However, it may not, in its endeavor to control crime on the streets, sweep so broadly that it unduly restricts or criminalizes innocent or protected behavior. Because the police officers have such broad discretion in determining whether a person, who was on the streets and sidewalks of the housing development, was there at the invitation of a tenant or was there for a "legitimate" purpose, the officers could, as they did here, bar a person from public property for exercising a constitutionally protected right. Once barred, the person continues to be barred and subject to a trespass conviction, as with Hicks, even though he or she may subsequently be there at the invitation of a tenant or for legitimate purposes. *See generally NAACP v. Alabama*,

377 U.S. 288, 307, 12 L. Ed. 2d 325, 84 S. Ct. 1302 (1964). The evidence does not indicate that Hicks was initially barred because he had committed any unlawful act in Whitcomb Court.[4] According to the unrefuted avowal of defense counsel, Hicks was barred from Whitcomb Court because he repeatedly returned there to visit his mother, his aunt, and the mother of his two infant children who live in Whitcomb Court. After being barred, Hicks was given written notice of his barment, for which he signed, from housing manager Gloria Rogers. On the occasion for which Hicks was subsequently charged with the trespass that is the subject of this appeal, he was walking on the sidewalk of the 2300 block of Bethel Street in Whitcomb Court and was purportedly there to see that his child, who lived there with its mother, received diapers.

The question presented in this appeal is whether the barment proceeding adopted by RRHA, which authorizes Richmond City police officers to banish people who do not fit within a narrowly defined group from coming upon the streets and sidewalks in Whitcomb Court, and the trespass statute as used to enforce the barment proceeding, violate the First and Fourteenth Amendments. The critical issue in answering that question is whether the streets and sidewalks are public and, as such, are a "traditional public forum," or whether they are "private" and, thereby, a "non-public forum."

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[4] As the majority notes, Hicks was convicted of destroying private property in Whitcomb Court after he had been barred for being there not as a tenant or at the express invitation of a tenant. However, the conviction for destroying private property was irrelevant to the barment proceeding or to Hicks' trespass conviction.

The constitutionality of government regulation of its own property depends upon the character of the property at issue. For purposes of First Amendment analysis, the Supreme Court has identified three types of government-owned property: the traditional public forum, the designated forum, and the nonpublic forum. A traditional public forum, such as a street or park, is one that has as "a principal purpose . . . the free exchange of ideas." A designated forum is one which the government intentionally opens to the public for expressive activity.

Government limitations on expressive activity in traditional public fora and designated public fora are subject to strict scrutiny; they must be narrowly tailored to serve a compelling state interest. By contrast "[a] nonpublic forum is 'public property which is not by tradition or designation a forum for public communication,'" and limits on access to such need only be reasonable. . . .

Daniel v. City of Tampa, 38 F.3d 546, 549 (11th Cir. 1994) (citations omitted).

Although the grounds and buildings of a public housing development are a "non-public forum" designed to provide safe housing for its residents, *see id.* at 550, the public streets and sidewalks in Whitcomb Court are not private and do not lose their character as a "traditional public forum" merely because the City passes an ordinance and executes a deed declaring them to be private property. The streets and sidewalks have not been gated, barricaded, or closed in a manner restricting public travel. Although the "No Trespassing" street signs declare that the streets are for the exclusive use of the tenants and

those there on legitimate business, the streets and sidewalks continue to serve the same function as before and are equally accessible to the travelling public.

We have previously approved a process by which police officers may be designated as agents of a housing authority to serve barment notices on persons trespassing on housing authority property, *see Collins v. Commonwealth*, 30 Va. App. 443, 449, 517 S.E.2d 277, 280 (1999); *Holland v. Commonwealth*, 28 Va. App. 67, 70-76, 502 S.E.2d 145, 146-49 (1998). In *Collins*, we further held that the barment notices prohibiting non-residents from coming upon housing authority property do not violate the "right of association" protected by the First Amendment or the due process clause of the Fourteenth Amendment. *See Collins*, 30 Va. App. at 450-53, 517 S.E.2d at 280-82. However, what distinguishes this case from those, in my opinion, is that Hicks was found guilty of trespass for having gone upon Bethel Street and the adjacent sidewalk, whereas in both *Holland* and *Collins*, the defendants were on the non-public grounds and in the buildings of the housing authority.

The majority relies upon the holding in *Daniel*, 38 F.3d 546, for its conclusion that the "trespass after warning" restriction the housing authority had placed upon access to a "non-public forum" was reasonable. In my opinion, Richmond City Ordinance No. 97-181-197, which authorizes deeding certain city streets to RRHA in an effort to "privatize" the streets in Whitcomb Court and make them subject to the Commonwealth's trespass statute, Code § 18.2-119, did not make the street any less a public street or thoroughfare and did not make it a "non-public forum," as was the situation in *Daniel*. The Eleventh Circuit held in *Daniel* that the mission of the housing

authority was to provide safe housing for residents, not to provide non-residents "a place to disseminate ideas." Thus, the buildings and grounds were considered a non-public forum for purposes of determining the extent to which the government could, consistent with the First Amendment, regulate the public's activity on the property. *See* 38 F.3d at 550. However, the *Daniel* court was careful to point out that the Tampa "trespass after warning" ordinance did not apply to persons on the "streets and sidewalks surrounding and intersecting" the housing authority property. *See id.* at 548 n.3, 550 n.9.

"A traditional public forum, such as a street or park, is one that has as 'a principal purpose . . . the free exchange of ideas.'" *Id.* at 549 (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985)). Bethel Street is a public street that was built and maintained with public funds to provide access by the public to that part of Richmond. As with all public streets and thoroughfares, historically and traditionally public streets have served as a locale for the free exchange and dissemination of ideas and have served as an area that citizens can freely and lawfully congregate or move about and exchange discourse.

The fact that legal title to the streets is transferred from a municipal government to a government agency which owns and operates a public housing development in no way changes the public nature and character of the streets and sidewalks which provide access to the public to this part of the City. *See Marsh v. Alabama*, 326 U.S. 501, 90 L. Ed. 265, 66 S. Ct. 276 (1946) (holding that privately owned streets and sidewalks in a company-owned town which are open to public access are traditional public forums that are circumscribed by First Amendment

constitutional guarantees). The City cannot transform the public streets in Whitcomb Court into private or non-public streets by declaring them closed by ordinance and conveying them to another governmental entity when they continue to serve the same public purpose as before.

Thus, the City's and RRHA's effort to control conduct or the lawful freedom of movement on a city street, which is a "traditional public forum," by "privatizing" the street and prohibiting citizens from using the streets and sidewalks must pass a strict scrutiny test. In order for the barment-trespass policy to satisfy the strict scrutiny test, the enforcement procedure must be narrowly tailored to serve a compelling state interest, providing safe housing to the development residents. In my view, the RRHA's privatization effort and barment procedure does not satisfy the requirement that the barment-trespass procedure be narrowly tailored because the procedure (1) infringes on the constitutionally protected right of a person's freedom to "remove from one place to another according to inclination," *Williams v. Fears*, 179 U.S. 270, 274, 45 L. Ed. 186, 21 S. Ct. 128 (1900), and to move freely in a traditional public forum, *see City of Chicago v. Morales*, 527 U.S. 41, 54, 144 L. Ed. 2d 67, 119 S. Ct. 1849 (1999) (holding "it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is 'a part of our heritage'"), and (2) is not limited to apply only to those persons whose conduct the procedure was intended to curtail. In other words, the sweep of the barment-trespass proceeding is so broad that citizens who do not infringe upon the privacy rights of the residents of Whitcomb Court are deemed guilty of criminal conduct for engaging in

constitutionally protected public behavior by merely being upon the public street or sidewalk.

Perhaps, had Bethel Street been gated, barricaded, or physically restricted to traffic where the public was not free to travel, as with gated communities, the street would be considered non-public and not a "traditional public forum." But, in my opinion, the City can no more "close" the streets in Whitcomb Court and leave them open to the public, thereby purporting to make them a "non-public forum," than it could declare "closed" all streets in Richmond's troubled neighborhoods and residential areas, thereby denying access to all citizens except the residents and their invitees and those having legitimate business in the neighborhoods. Neighborhood streets, such as those in Whitcomb Court, are public streets, paid for and maintained with public funds, for the use and benefit of the public.

While a public entity can restrict the use of public property or buildings to those who are using the property for its intended "non-public" purpose, such as an office building, it cannot restrict public property that is considered a "traditional public forum," such as a street or sidewalk, that is being used in a lawful way and for a lawful purpose that is constitutionally protected. *See United States v. Kokinda*, 497 U.S. 720, 727, 111 L. Ed. 2d 571, 110 S. Ct. 3115 (1990) (holding that sidewalk in front of post office "constructed solely to provide for the passage of individuals engaged in postal business" is a non-public forum). Here, in effect, the City and RRHA, by attempting to convert the streets and sidewalks to private property, are attempting to confer upon RRHA the same rights as a private property owner who may restrict everyone from coming upon the private property owner's property except

the owner's tenants and the tenants' invitees, regardless of whether the invitees had done anything unlawful. In fact, the City's attempt to control access to the streets and sidewalks through the barment-trespass proceeding exceeds the right of a private landowner because under the barment proceeding, once barred, an invitee of a tenant can no longer lawfully come upon the property.

Accordingly, I would reverse Hicks' trespass conviction, because Richmond's barment-trespass procedure, in an effort to control drugs and criminal activity in and around a public housing development, unconstitutionally infringes upon a citizen's First and Fourteenth Amendment rights to lawfully congregate in a public place.[5]

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[5] Because I would reverse on the failure of the City to establish that the barment-trespass procedure meets the strict scrutiny requirements, I do not address whether the barment-trespass procedure, including notice, opportunity to be heard, and an administrative appeals procedure, satisfies the procedural due process requirements of the Fourteenth Amendment. Because the majority only addresses the vague and overbroad issue as they relate to the trespass statute procedure, I decline to address whether the barment-trespass procedure is vague or overbroad.

[Trial Court's Sentencing Order on Trespass Conviction]

Virginia:

In the Circuit Court of the City of Richmond, John Marshall Courts Building

July 29, 1999

COMMONWEALTH

vs. Appeal for Trespassing M-99-1606
Appeal for Failing To Appear M-99-1608

KEVIN LAMONT HICKS, Defendant.

The defendant this day appeared and was set to the bar in the custody of the Sheriff of this City. He was represented by Attorney Steven Benjamin, retained counsel; and the Commonwealth was represented by Russell McGuire. The defendant consented to having these cases tried simultaneously.

Being arraigned, the defendant pleaded not guilty to trespassing, as charged in Appeal M-99-1606; and he pleaded not guilty to failing to appear in the General District Court, as charged in Appeal M-99-1608, after consultation with counsel. With the consent of the accused, given in person, after consultation with counsel, and the concurrence of the Court and the Attorney representing the Commonwealth, the Court proceeded to hear and determine these cases without a Jury. The witnesses having been sworn, and the Court having heard the evidence for the Commonwealth, the defendant, by counsel, moved the Court to strike the evidence of the Commonwealth as being insufficient for the finding of a judgment of guilty, which motion the Court granted in the case of M-99-1608, and the case of M-99-1608 is hereby dismissed. The

Court having heard the arguments of counsel, finds the defendant guilty as charged in the case of M-99-1606, and ascertains his term of confinement in Jail at Twelve Months.

Whereupon it is the judgment of this Court that the said Kevin Lamont Hicks be confined in Jail for a term of Twelve Months; and that he pay and satisfy a fine of $1,000.00 in the case of M-99-1606. The execution of the said Jail sentence is suspended during the defendant's good behavior for five years; and the payment of said fine is suspended during the defendant's good behavior for five years. The defendant is to pay his costs of Court in the case of M-99-1606.

The defendant was remanded to Jail on another charge.

DOB: 1/21/76

July 29, 1999 ENTER: /s/ Thomas N. Nance
Thomas N. Nance, Judge

Virginia:

In the Circuit Court of the City of Richmond, John Marshall Courts Building

SENTENCING ORDER

Federal Information Processing Standards Code: 760

Hearing Date: July 29, 1999
Judge: Thomas N. Nance

COMMONWEALTH OF VIRGINIA

v.

KEVIN LAMONT HICKS, DEFENDANT.

The defendant was this day led to the bar in the custody of the Sheriff of this City. He was represented by **Steven Benjamin** retained counsel; and the Commonwealth was represented by **Russell McGuire**. The defendant consented to having these cases tried simultaneously.

Being arraigned, the defendant pleaded not guilty to violating the terms of a suspended sentence previously imposed in each case by the General District Court, after consultation with counsel. The defendant waived trial by Jury, and the evidence in each case was previously adopted from the motions hearing held on July 13, 1999. The Court finds that the judge of the General District Court did not abuse his discretion in revoking each of the suspended sentences in the following cases:

CASE NUMBER	OFFENSE DESCRIPTION AND INDICATOR (F/M)	OFFENSE DATE	VA. CODE SECTION
M-99-1605	**Abuse of Discretion**	**2/3/99**	**19.2-306**
M-99-1607	**Abuse of Discretion**	**2/3/99**	**19.2-306**
M-99-1609	**Abuse of Discretion**	**2/3/99**	**19.2-306**

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

The Court **SENTENCES** the defendant to:

Incarceration with the City Jail for the term of: Twelve Months in the case of M-99-1605; Six Months in the case of M-99-1607; and Twelve Months in the case of M-9-1609. The total sentence imposed is **Thirty Months**.

The Court orders that said sentences run **concurrently** upon the following conditions:

Good behavior. The defendant shall keep the peace and be of good behavior.

Costs. The defendant shall pay his costs of Court in these cases.

The defendant was remanded to Jail.

July 29, 1999 ENTER: /s/ Thomas N. Nance
Thomas N. Nance, Judge

DEFENDANT IDENTIFICATION:

Alias: None
SSN: 227-29-3730 DOB: 1/21/76 Sex: Male

SENTENCING SUMMARY:

TOTAL SENTENCE IMPOSED: Thirty Months

TOTAL SENTENCE SUSPENDED: Sentences to run concurrently

VIRGINIA:

IN THE CIRCUIT COURT OF THE
CITY OF RICHMOND
John Marshall Courts Building

COMMONWEALTH OF VIRGINIA

v.

KEVIN LAMONT HICKS

MOTION TO DISMISS

(Filed Jul. 12, 1999)

The defendant, by counsel, moves this Honorable Court to dismiss the prosecution of all matters before this court, including charges of trespass and orders concerning the revocation of suspended sentences for conviction and instances of trespass. In support of this motion, the defendant states as follows:

1. In 1997, the City of Richmond, the Richmond Police Department, and the Richmond Redevelopment and Housing Authority (RRHA), a political subdivision of the Commonwealth of Virginia, developed a law enforcement strategy and trespass policy for use in various public housing communities.

2. The strategy was to take steps which would have the effect of broadening the scope and effect of the Virginia criminal trespassing statute (Va. Code §18.2-119) to deter and criminalize lawful conduct not otherwise reached by the statute.

3. A purpose of this strategy (which is referred to in this motion as "the trespass policy"), was to discourage the presence of guests in these communities.

4. Another purpose of this strategy was to regulate, deter, and criminalize the presence in the communities of a class of persons loosely defined as "unauthorized."

5. These purposes are achieved by permitting and causing the Richmond Police to detain, interrogate, and search any people within the community suspected of being nonresidents or "unauthorized."

6. These purposes are further achieved by threatening prosecution of all unauthorized people present in the community.

7. These purposes are further achieved by threatening eviction and loss of public housing for residents permitting or assisting the presence of unauthorized guests.

8. Part of the trespass policy involves the banning of people from the community for undefined reasons, and the prosecution of these people upon their reentry, for any reason, into the community. As part of the policy, once a person is banned from the community, that ban is permanent and irrevocable.

9. In order to accomplish these goals, and in furtherance of other ends of the strategy, the City passed ordinances closing designated streets within public housing communities and deeded by quitclaim its rights in the closed portions to RRHA.

10. The purpose for closing the streets was to enable the City to characterize an entire housing community as private property. Once accomplished, the City's strategy was to use the Richmond Police Department to enforce the trespassing statute to deter the association and presence of people in the community not conducting legitimate business or who were not otherwise "authorized" to be present. Although the

housing communities have been characterized as private property, this labeling is a pretext; the public housing communities are in fact public property in all essential respects.

11. Towards accomplishing the intended deterrent effect, the City and RRHA publishes and distributes pamphlets describing the program.

12. These pamphlets warn that "selected streets" are RRHA property, and that "unauthorized persons" will be considered trespassers and will be prosecuted. "Unauthorized persons" are described as "any person who had been barred by RRHA from the development, or cannot demonstrate that they are on the development visiting a lawfully residing resident, or on the development conducting legitimate business."

13. The trespass policy developed and enforced by the parties, including the closing of the public streets and sidewalks, violate the First and Fourteenth Amendments to the United States Constitution and Article I, §12 of the Constitution of Virginia, by depriving the residents, their family, friends, and guests, of their fundamental rights to freedom of association, speech, and assembly, and by unconstitutionally suspending the First Amendment from applicability in these communities in violation of the Fourteenth Amendment and Article I, §7 of the Constitution of Virginia.

14. The trespass policy developed and enforced by the parties, including the closing of the public streets and sidewalks, violates the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment to the United States Constitution by depriving residents of public housing and their guests of basic liberty interests and privacy without due process of law and for no legitimate or rational purpose.

15. The trespass policy developed and enforced by the parties, including the closing of the public streets and sidewalks, authorize, cause, and encourage the warrantless detention of persons in these communities without reasonable suspicion or probable cause to believe that any crime has been committed, and for the mere exercise of their constitutional rights to freedom of association, travel, and assembly in violation of the First, Fourth, and Fourteenth Amendments to the United States Constitution.

16. The trespass policy developed and enforced by the parties, including the closing of the public streets and sidewalks, invests unbridled and unreviewable discretion in the police and RRHA, is unconstitutionally vague and overbroad, and permits and encourages arbitrary and capricious enforcement by the police, RRHA, and the City of Richmond.

17. The alleged banning of Kevin Hicks from public housing projects, his detention and interrogation by the police, and his arrests and convictions for trespassing, were the product of the unconstitutional trespassing policy and enforcement of Va. Code §18.2-119 described in this motion. For each and all of the reasons alleged herein, the matters pending before this court should be dismissed.

KEVIN LAMONT HICKS

By /s/ S.D.B.
Counsel

Steven D. Benjamin
BENJAMIN & DesPORTES, P.C.
P.O. BOX 2464
Richmond, Virginia 23218-2464
(804) 788-4444

[Ruling on Motion to Dismiss – Circuit Court of City of Richmond – June 15, 1999]

* * *

MR. BENJAMIN: Well, that's unconstitutional and not right. That's just not right.

That's my argument.

THE COURT: Okay.

MR. BENJAMIN: In addition to the law.

THE COURT: I deny your motion.

* * *

[Errors Assigned by the Commonwealth in Its Petition for Appeal to the Supreme Court of Virginia.]

ASSIGNMENTS OF ERROR

I. **THE COURT OF APPEALS ERRED BY HOLDING THAT HICKS, WHO FAILED TO DIRECTLY CHALLENGE HIS BARMENT BY RRHA, HAD TIMELY RAISED THE ISSUE OF THE CONSTITUTIONALITY OF THE BARMENT TRESPASS PROCEDURE WHEN HE RAISED IT AS A DEFENSE IN HIS CRIMINAL CASE.**

II. **THE COURT OF APPEALS ERRED BY HOLDING THAT THE PRIVATIZED STREETS AND SIDEWALKS IN WHITCOMB COURT CONSTITUTED A PUBLIC FORUM, SUBJECT TO STRICT SCRUTINY FOR CONSTITUTIONAL ANALYSIS.**

III. **THE COURT OF APPEALS ERRED BY HOLDING THAT THE TRESPASS POLICY OF RRHA VIOLATED THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.**

[Questions Presented by the Defendant in his Brief on Appeal to the Court of Appeals of Virginia.]

QUESTIONS PRESENTED

1. Did the circuit court err in denying the defendant's motion to remand his cases to the general district court for prosecution by a Commonwealth's Attorney before a different judge or to dismiss the charges against him? (App. 8-9, 47-48).

2. Did the trial court err in denying the defendant's motion to dismiss the prosecution against him for violations of the right to due process and the rights to freedom of association, speech, and assembly? (App 104-103).

AN ORDINANCE No. 97-181-197

[OFFERED MAY 27, 1997]

[ADOPTED JUNE 23, 1997]

To close to public use and travel Carmine Street, Bethel Street, Ambrose Street, Deforrest Street, the 2100-2300 Block of Sussex Street and the 2700-2800 Block of Magnolia Street, in Whitcomb Court, as shown hatched on a plan prepared by the Department of Public works, and designated as DPW Drawing No. P-23116, dated February 18, 1997 (Project #E12-195-SC), entitled: "Proposed Closing of Carmine St., Bethel St., Ambrose St., Deforrest St., Sussex St. & Magnolia St. (Retaining as a Full Width Utility Easement) in Whitcomb Court (Richmond Redevelopment & Housing Authority)", upon certain terms and conditions.

Patron – City Manager (*By Request*)

Approved as to form and legality
by the City Attorney

PUBLIC HEARING JUNE 23, 1997 AT 8 P.M.

THE CITY OF RICHMOND HEREBY ORDAINS:

§ 1. That Carmine Street, Bethel Street, Ambrose Street, Deforrest Street, the 2100-2300 Block of Sussex Street and the 2700-2800 Block of Magnolia Street, in Whitcomb Court, as shown hatched on a plan prepared by the Department of Public works, and designated as DPW Drawing P-23116, dated February 18, 1997 (Project # E12-195-SC), entitled: "Proposed Closing of Carmine St.,

Ethel St., Ambrose St., Deforrest St., Sussex St. & Magnolia St. (Retaining as a Full Width Utility Easement) in Whitcomb Court. (Richmond Redevelopment & Housing Authority)", a copy of said drawing being attached to this ordinance, be and are hereby closed to public use and travel and abandoned as streets of the City of Richmond, such streets being no longer needed for the public convenience.

§ 2. This ordinance, as to the closing of the streets identified above, shall be in force as provided in Section 4.09 of the Charter of the City of Richmond and shall become effective when, within twelve months from the day this ordinance is in force (a) consent to the closing is obtained from each of the owners of land, buildings or structures from whom consent is required under Section 25-132 of the Code of the City of Richmond, 1993, which consents shall be in writing, approved as to form by the City Attorney, and filed in the office of the City Clerk; (b) the applicant makes arrangements satisfactory to public and/or private utilities or public service corporations whose properties or facilities are in said streets for either the removal, relocation or abandonment thereof or for the construction, reconstruction, maintenance and repair thereof, evidence of which shall be in writing, approved as to form by the City Attorney, and filed in the office of the City Clerk; (c) applicant bears all cost involved, including, but not limited to, removal, relocation and/or realignment of utilities, installment of new utilities, new or revised street name signs, etc. as directed by City Agencies, and agrees in writing with the City that for itself, its successors and assigns, it will indemnify, reimburse, keep and hold the City free and harmless from liability on account of injury or damage to persons, firms or corporations or

property which may result directly or indirectly from the closing of the streets to public use and travel by this ordinance and the construction or interference with the flow or overflow of surface or subsurface water resulting directly or indirectly therefrom; and in the event that any suit or proceeding is brought against the city at law or in equity, either independently or jointly with the owner or owners of all the property abutting the aforesaid streets, or any of them, on account thereof, to defend the city in any such suit or proceeding at its costs; and in the event of a final judgment or decree being obtained against the City, either independently or jointly with the property owner or owners granting consent for the aforesaid streets to be closed to public use and travel, or any of them, to pay such judgment or comply with such decree including payment of all costs and expenses of whatsoever nature and hold the City harmless therefrom; (d) that eighteen foot fire lanes shall be maintained in the closed street for fire and emergency vehicle access; (e) that applicant shall make provisions to give the appearance that the closed street, particularly at the entrances, are no longer public streets and that they are in fact private streets.

§ 3. The City shall retain a full width utility easement in the streets proposed to be closed by this ordinance as shown hatched on the Department of Public Works Drawing No. P-23116, attached hereto.

§ 4. The City shall retain a full width right of way maintenance easement in the streets proposed to be closed by this ordinance.

§ 5. That the aforesaid closed street shall be designated as public highways for law enforcement purposes in accordance with Virginia Code § 46.2-1307.

§ 6. That Richmond Redevelopment & Housing Authority, as applicant, shall be responsible for satisfying all terms and conditions requisite for the closing of the streets and shall provide the Department of Community Development, Division of Permits and Services, the Law Department, and the City Clerk's office with written evidence that all conditions of this ordinance have been satisfied.

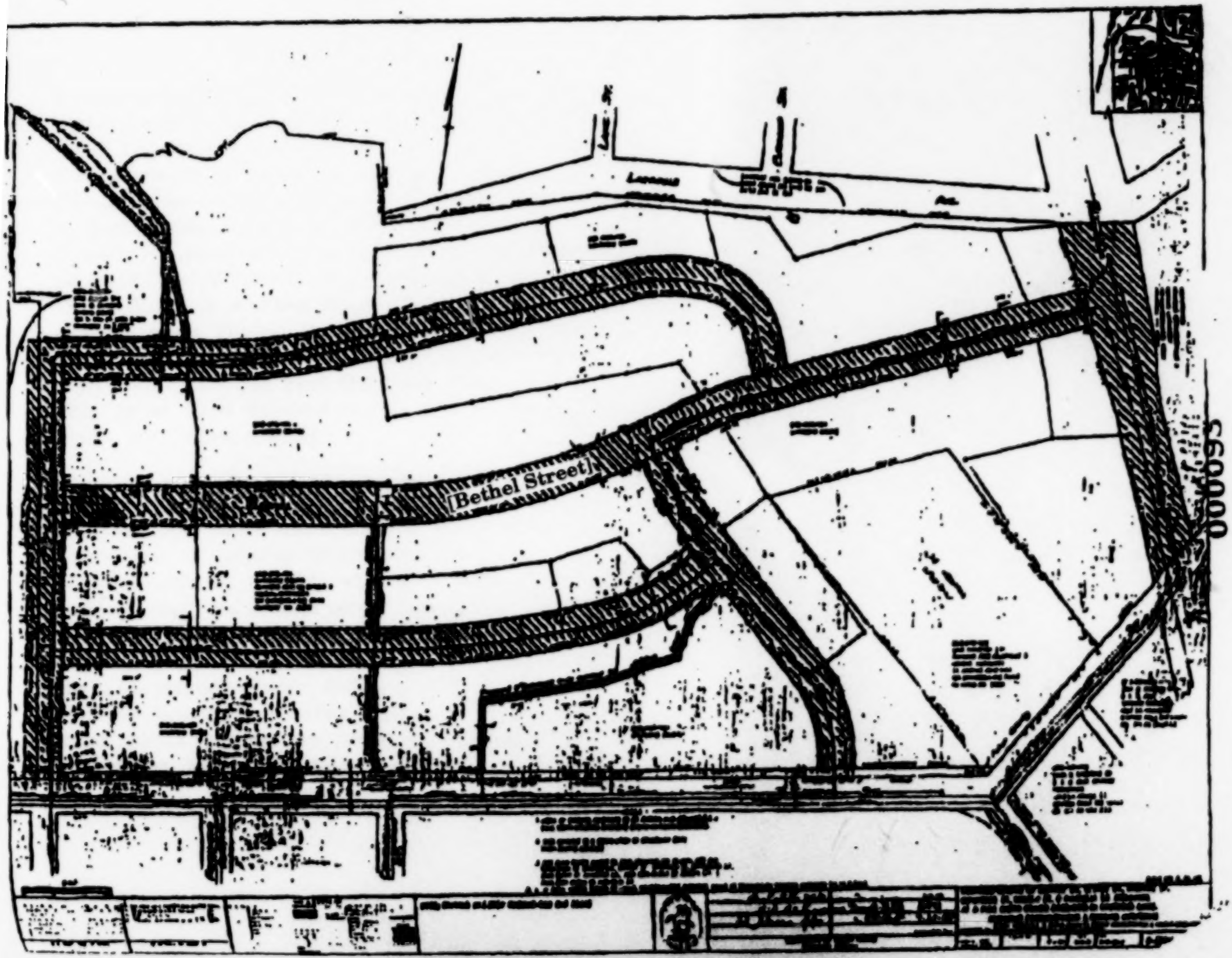
§ 7. At such time as this ordinance becomes effective the City shall have no further right, title and interest in said streets other than expressly retained under provisions of this ordinance or as shown on the attached drawing or granted to satisfy terms and conditions set out in this ordinance.

§ 8. This ordinance shall be in force and effect upon satisfaction of the terms and supersede Ordinance No. 97-143-124, adopted May 12, 1997.

THE CITY OF RICHMOND HEREBY FURTHER ORDAINS:

§ 9. That the aforesaid closed streets are hereby designated as highways for law-enforcement purposes in accordance with Virginia Code § 46.2-1307.

A TRUE COPY:
TESTE:
/s/ Edna Keys-Chavis
CITY CLERK


Bethel Street

AUTHORIZATION

Richmond Redevelopment and Housing Authority hereby authorizes each and every sworn officer of the Richmond Police Department to enforce the trespass laws of the Commonwealth of Virginia as stated in Virginia Code § 18.2-119 upon Richmond Redevelopment and Housing Authority public housing property. Said property is that property located at and commonly known as: Gilpin Court, Fairfield Court, Whitcomb Court, Creighton Court, Mosby Court, Blackwell Scattered Sites, Hillside Court, Fulton (a.k.a. Rainbow Village), Dove Court, Afton Apartments, Fay Towers, Randolph Place, 1920 Stonewall Avenue, 1200 Decatur Avenue, 3900 Old Brook Circle, 18-A W. 27th Street, 2700 Ildewood Avenue, 700 S. Lombardy Street, 1611 Fourth Avenue.

Richmond Redevelopment and Housing Authority further authorizes each and every Richmond Police Department officer to serve notice, either orally or in writing, to any person who is found on Richmond Redevelopment and Housing Authority property when such person is not a resident, employee, or such person cannot demonstrate a legitimate business or social purpose for being on the premises. Such notice shall forbid the person from returning to the property. Finally, Richmond Redevelopment and Housing Authority authorizes Richmond Police Department officers to arrest any person for trespassing after such person, having been duly notified, either stays upon

or returns to Richmond Redevelopment and Housing Authority property.

RICHMOND REDEVELOPMENT AND
HOUSING AUTHORITY:

By: /s/ T.P. Curtis
T.P. Curtis Director of Housing Operations

[Notarial Certificate Omitted In Printing]

VIRGINIA:

IN THE CIRCUIT COURT OF THE
CITY OF RICHMOND

JOHN MARSHALL COURTS BUILDING

COMMONWEALTH OF VIRGINIA

vs

KEVEN LAMONT HICKS

Complete transcript of testimony and other incidents in the above, when heard on July 13, 1999, before the Honorable Thomas N. Nance, Judge.

* * *

[Gloria Rogers]

[42] A No.

Q If an organization wanted to use the privatized street or sidewalk in a housing community in order to hold some sort of demonstration, in order to walk back and forth with signs in support of some sort of political position, would they be permitted on the property if they were nonresidents?

A They could get permission first. And I would say, again, I need it in writing to see the nature or whatever. They need permission first to be on the property.

Q Are you in a position – does your position enable you to tell people – to give people permission to come on and picket or demonstrate on housing community property?

A I'm not sure what you're asking. To picket? I've had people to [sic] call to pass out flyers, and asked to have church services. And these are things I'm used to.

As far as picketing and stuff, I never had that so I'm not familiar with it.

Q Let's talk about what you're used to.

[43] A Okay.

Q With situations such as those, people wanting to pass out flyers for example, or hold church related meetings, do they have to come to you for permission?

A Yes.

Q Then do you give permission?

A Depending on the circumstances, sometimes it's granted, yes.

Q Sometimes you do and sometimes you don't?

A Correct.

Q Are there any particular guidelines, criteria that you refer to [sic] determine whether or not any group or type of religion will be allowed to circulate any of those things?

A Yes. I refer all those to community council and they meet with the board and the residents to decide, because there's so many residents and so many things, the City Council and housing management work out – we're not – we don't rely on –we don't mind a one time only religious – we don't want [44] every week or what have you. And they set up the guidelines on whether these services can take place.

As far as passing out flyers, you know, I was asked to grant and hopefully it's not solicitation or selling or those type things.

Q What flyers are permitted? Is somebody permitted to come in there and pass out flyers?

A Everyone who comes in to pass out flyers, do not come by me. So I see them if they come and ask permission, those are the type of things I look for.

Q If somebody comes to you and asks for permission to hand out flyers, do you give them permission?

A Once I look at the flyer and it's not – it's just church services or inviting to a community day or those type of things, you know, a flyer I'm used to seeing, I do not deny anyone permission to hand out flyers, the ones that I have seen.

Q In those situations, it is up to you; is that correct?

[45] A Only up to me – If it's something I'm uncomfortable with, I will refer it to Mr. Akinwande, if it's not routine that I'm used to seeing, I just kind of refer it to Mr. Akinwande to get approval at that point.

Q Who is that person?

A Assistant director of housing operations. He's my immediate supervisor.

Q When trespassing arrests are made, do the police advise you of who they have arrested for trespassing on public housing property?

A Yes.

Q Do they – in a situation where that person has claimed to be connected with a particular resident or particular apartment, do the police advise you of that?

A Yes.

Q Have the tenants been advised that if they acknowledge someone as their guest, they tell the police, oh, yes, he's my guest or whatever, have the tenants been told in that situation that if that person isn't lawfully a guest, that's a

* * *

[Information Provided to Residents Concerning Street Privatization and the No-Trespass Policy]

Richmond Redevelopment and Housing Authority

What you should know

about

Street Privatization

Some answers to most often asked questions.

[LOGO]
REDEVELOPMENT & HOUSING AUTHORITY

RRHA, through an initiative sponsored by the city administration and with the approval of the Richmond City Council, is privatizing streets in public housing communities. ***THIS MEANS:***

- ✓ ***Selected streets are new RRHA property.***
- ✓ ***Unauthorized persons (any person who has been barred by RRHA from the development, or cannot demonstrate that they are on the development visiting a lawfully residing resident, or on the development conducting legitimate business, will be considered unauthorized) are considered trespassers and will be prosecuted as such.***
- ✓ ***Police and the housing authority can now take action against unauthorized persons who in the past would step off of the curb to prevent arrest for trespassing.***

The goal of street privatization is:

- To make communities safer by removing persons who commit unlawful acts which destroy the peaceful enjoyment of other residents.

- To ensure that children have places to play free of drug paraphernalia and the danger of gunshots and other criminal activity.
- To provide an opportunity for residents to develop safety initiatives in their community, such as resident patrols, social security number property identification, neighborhood watch, etc.
- To hold households who knowingly harbor persons who engage in criminal activity accountable.

What street privatization DOES NOT MEAN:

- Physical barriers blocking street access. The only markers will be signs at entry points, and throughout the development.
- Disruption to the flow of traffic or services. School buses, delivery trucks, and city service vehicles will be able to drive into the development. RRHA and residents will decide on the need to decal cars on a development by development basis.
- Residents and their legitimate guests are subject to harassment or intimidation.
- RRHA properties are under the control of the federal government.
- Legitimate guests are prohibited from visiting residents.
- Disruption to the normal activity of most residents.
- Drug dealers and buyers can step off the street to prevent police arrest.
- Any change in the enforcement of laws by the police. Reports of violations of the law will continue to be handled in the same manner.

How can I help?

- Support and explain the idea to your neighbors. Remind relatives, neighbors, and guests that we all must help in making our communities safer. Let them know that privatizing the streets is just one tool to promote safer communities.
- Be willing to accept the minor inconvenience of you and/or your guest ***POSSIBLY*** being questioned by police enforcing the law. Since police are not always able to determine who is a resident, they may, from time to time, have to stop and ask questions. Resident cooperation with the police will help in making the community safer for all residents.
- Work with your tenant council to develop other crime prevention and safety initiatives which support the street privatization effort.
- Provide feedback to housing management and resident services staff on how the effort is going.

If you have questions, comments, or concerns about privatization or wish to find out further how you can help in this effort, please

Call your
HOUSING MANAGER.

[LOGO]
REDEVELOPMENT
& HOUSING AUTHORITY

Kevin Hicks
Dear Mr. Hicks:

Re: Trespassing on RRHA property
Kevin Hicks
DOB Jan 26, 1976
SSN 227-29-3734

This letter serves to inform you that effective immediately you are not welcome on Richmond Redevelopment and Housing Authority's Whitcomb Court or any Richmond Redevelopment and Housing Authority property. This letter is an official notice informing you that you are not to trespass on RRHA property. If you are seen or caught on the premises, you will be subject to arrest by the police.

A copy of this notice is on file and another copy will be provided to the Richmond Police Department for their record.

Virginia Code, Section 18.2-119

Trespass After Having Been Forbidden to do So

"If any person without authority of law goes upon or remains upon the lands, buildings, or premises of another, or any part, portion or area thereof, after having been forbidden to do so, either orally or in writing by the owner, lessee, custodian, or other person lawfully in charge thereof, or after having [sic] forbidden to do so by a sign or signs posted ... on such lands, buildings, premises or portion of area thereof as a place or places where it may be reasonably

seen ... he and/or she shall be guilty of a Class I Misdemeanor."

Thank you for your cooperation.

Sincerely,

/s/ Gloria S. Rogers
Housing Manager

Whitcomb
Development

I, the undersigned, acknowledge receipt of this notice.

/s/ Kevin Hicks Signature	4-14-98 Date received
/s/ Alfonzo Joyner Witnessing Officer	4-14-98 Date

Supreme Court, U.S.
FILED
NOV 21 2002
OFFICE OF THE CLERK

(18)

No. 02-371

IN THE SUPREME COURT
OF THE UNITED STATES

Commonwealth of Virginia,

Petitioner,

v.

Kevin Lamont Hicks,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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November 21, 2002

19 pp

QUESTIONS PRESENTED

1. May an individual charged with trespass for being on streets adjacent to a public housing project raise a First Amendment overbreadth challenge to a policy that grants government officials unfettered discretion to choose who may have access to those streets?

2. Does a government policy of excluding the public from streets and sidewalks adjacent to a public housing project violate the First Amendment on the ground that it is not narrowly tailored to serve a compelling government interest?

3. Does the government policy of excluding the public from a housing project and the streets and sidewalks surrounding it violate the constitutional right of freedom of association?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Kevin Lamont Hicks was convicted of trespass for walking along a street adjacent to a public housing project in Richmond, Virginia. Hicks had been barred from entering the housing project and adjacent streets under a government policy that granted the manager of the housing project, Gloria Rogers, permission to exclude any nonresident who could not demonstrate "a legitimate business or social purpose for being on the premises." Pet. App. 4-5. At a hearing, Ms. Rogers explained that she was free to permit or deny anyone, including religious groups, leafleters, and protestors, from using the streets surrounding the housing project. Hicks raised an overbreadth challenge to this policy, and the Supreme Court of Virginia reversed the conviction and invalidated the policy on the ground that it substantially impinged on constitutionally-protected expression. As shown below, that ruling is correct and does not present issues meriting review by this Court.

STATEMENT OF THE CASE

On July 23, 1997, the City Council of Richmond, Virginia authorized the closing of several streets in the area surrounding Whitcomb Court, a public housing project in Richmond. The Council conveyed those streets, as well as the adjacent sidewalks, to the Richmond Redevelopment & Housing Authority, a government entity that owns and operates this project. Pet. App. 3. The streets and sidewalks at issue surround Whitcomb Court, and are not contained within it. Pet. App. 30. Prior to their "privatization," these streets were used by the public and were similar in appearance to all other streets in Richmond. Pet. App. 30.

Although the Housing Authority erected "no-trespassing" signs along the streets, the streets were not barricaded or gated. Pet. App. 31. Indeed, some of the streets are "privatized"

for only a few blocks and are public on both ends of the "privatized" blocks. Pet. App. 37. The Housing Authority authorized the Richmond police to enforce the trespass laws of Virginia on its newly-acquired "property," and further authorized

> each and every Richmond Police Department officer to serve notice, either orally or in writing, to any person who is found on Richmond Redevelopment and Housing Authority property when such person is not a resident, employee, or such person cannot demonstrate a legitimate business or social purpose for being on the premises. Such notice shall forbid the person from returning to the property. Finally, Richmond Redevelopment and Housing Authority authorizes Richmond police officers to arrest any person for trespassing after such person, having been duly notified, either stays upon or returns to Richmond Redevelopment and Housing Authority.

Pet. App. 4-5.

Gloria Rogers, the Housing Manager for Whitcomb Court, was the official responsible for implementing this policy. Pet. App. 5. Non-residents who wish to visit Housing Authority property, including the formerly public streets and sidewalks adjacent to Whitcomb Court, must first obtain Rogers' permission. Pet. App. 5. The Housing Authority has not established any guidelines limiting Rogers' discretion to grant or deny permission to enter the property. Pet. App. 5.

Respondent Kevin Hicks does not live in the Whitcomb Court house project, but his mother, his child, and his child's mother all do. Pet. App. 32. Hicks was convicted of trespassing at Whitcomb Court in February 1998 and June 1998. Pet. App. 32. On April 14, 1998, Rogers served Hicks with written notice that he was barred from the Whitcomb Court property, and that if he was "seen or caught on the premises, [he would] be subject to arrest by the police." Pet. App. 107. Hicks twice went to Rogers' office and asked for permission to visit Whitcomb Court, but his requests were denied. Pet. App. 32. On January 20, 1999, Hicks was

stopped by a Richmond police officer while walking along Bethel Street, one of the privatized streets adjacent to Whitcomb Court, and was issued a summons for trespass. Pet. App. 6.

In April 1999, Hicks was tried and convicted of trespass in Virginia district court. He then appealed to the Circuit Court of the City of Richmond, where he was to receive a trial *de novo*. Before that trial, Hicks moved to dismiss the trespass charge on the ground that the policy of prohibiting the public from entering the streets surrounding Whitcomb Court violates both the Virginia and federal constitutions. The court held a 45-minute hearing on that motion, during which Rogers testified. She explained that there were no guidelines in place to implement the Housing Authority's ban on public use of the streets and sidewalks of Whitcomb Court, and that she had complete discretion over whether to permit an individual or group to walk, meet, picket, leaflet, or gather for any purpose on the privatized streets of Whitcomb Court. Pet. App. 5. The court denied Hicks' motion.

Hicks was subsequently tried and convicted of trespass and sentenced to 12 months in jail and fined $1,000, although both these penalties were suspended. Pet. App. 82-83. Nonetheless, Hicks was required to serve a 12-month sentence because his conviction on this trespass charge violated the terms of the suspended sentences imposed on him for his previous trespass violations. Pet. App. 84-85.

Hicks appealed his conviction to the Virginia Court of Appeals, where he attacked the trespass policy on its face, arguing that it was unconstitutionally vague and overbroad. He also contested the policy on the ground that it violated his right of freedom of association under the First Amendment. A split panel of that court rejected his claims, affirming the decision of the trial court. Hicks then obtained a rehearing *en banc* in the Virginia Court of Appeals, which

reversed the panel. The *en banc* court held that streets and sidewalks are public fora, and that the Housing Authority's exclusion of the public from these fora violated the First and Fourteenth Amendments. Pet. App. 43.

The Supreme Court of Virginia affirmed. The court held that the Housing Authority's trespass policy was "overly broad" because it granted a government official unfettered discretion to determine who has a right to speak on Housing Authority property, in violation of the First Amendment. Pet. App. 16-17. The court did not review the Court of Appeals' determination that the Housing Authority's policy unconstitutionally excluded the public from a public forum. Pet. App. 16.

REASONS FOR DENYING THE WRIT

In its first question presented, petitioner asks this Court to establish a new rule limiting overbreadth challenges to cases in which there is a nexus between defendant's conduct and the law's unconstitutional application. Petitioner does not claim that there is any split in appellate authority on that issue or that the Virginia Supreme Court's decision is contrary to any precedent of this Court. Moreover, petitioner itself failed to raise this new limiting principle below, and thus this petition marks the *first* occasion on which any court has been asked to consider this argument. For these reasons alone, this Court should deny review.

In addition, petitioner is unable to show a lack of nexus between the grounds for Hicks' exclusion from Whitcomb Court and the constitutionally-impermissible applications of the policy. Thus, this Court could not apply petitioner's proposed "nexus" limitation on overbreadth challenges to this case. Finally, because this case arose in state court, where Article III standing concerns do not apply, it is not the proper vehicle in which to consider additional prudential

limitations on standing to make overbreadth challenges.

In its second question presented, petitioner asks this Court to resolve a circuit split on the question whether the government has greater leeway to restrict First Amendment rights when it is acting as landlord than when it is acting as sovereign. Again, petitioner failed to raise this issue below, and thus it is not preserved for review. In any case, as explained below, any additional latitude the government may have to restrict constitutional rights when acting as landlord is irrelevant to the question whether the government may prohibit any and all speech on traditional public fora such as streets and sidewalks. None of the cases cited by petitioner holds otherwise.

Finally, the policy at issue is unconstitutional for several reasons, all of which Hicks raised below and would raise again before this Court if the petition were granted. These alternative grounds for affirmance would likely prevent the Court from addressing the questions presented, and thus provide another reason for this Court to deny review.

I. PETITIONER'S PROPOSED LIMITATION ON OVERBREADTH CHALLENGES DOES NOT MERIT THIS COURT'S REVIEW.

A. Petitioner Did Not Preserve The Issue For This Court's Review.

Petitioner asks this Court to establish a "bright line rule" for overbreadth challenges. Under it, a defendant must show "(i) that *his own* conduct involved expressive activity, and (ii) that his conduct falls within the particular prohibition he challenges as overbroad." Pet. i (question presented), 16 (emphasis in original).

In its briefs in the courts below, petitioner never proposed this new "bright line rule" and never argued that Hicks' overbreadth challenge failed because his trespass violation was unrelated to the policy's prohibition on leafleting or other speech activities. In its appeal to the

Supreme Court of Virginia, petitioner asserted *only* that Hicks' overbreadth challenge should not prevail because the policy's overbreadth was not *substantial*. *See* Va. S. Ct. Br. 22 ("Hicks has not demonstrated a 'substantial risk' that enforcement of the policy 'will lead to the suppression of speech.'") (*quoting National Endowment for Arts v. Finley*, 524 U.S. 569, 580 (1998)). Because petitioner never previously raised this objection at any level below, it should not be permitted to do so for the first time before this Court. *See, e.g., TRW, Inc. v. Andrews*, 122 S. Ct. 441, 451 (2001); *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998); *Dothard v. Rawlinson*, 433 U.S. 321, 323 n.1 (1977); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Duignan v. United States*, 274 U.S. 195, 200 (1927). Thus, this Court should deny review based on the time-honored principle that the Court will not address arguments neither presented nor decided below.

B. The Facts Of This Case Prevent This Court From Addressing Petitioner's Proposal To Limit Overbreadth Challenges To Cases In Which There Is A Nexus Between The Challenger's Conduct And The Constitutionally-Impermissible Applications Of The Policy Being Challenged.

Even if petitioner had properly raised its proposed new limitation on overbreadth challenges, the facts of this case would prevent this Court from passing on that question. Petitioner asserts that 1) Hicks' offense did not involve any expressive conduct; and 2) his

---

Petitioner notes that this Court has granted certiorari in *Black v. Virginia*, 553 S.E.2d 738 (2001), *cert. granted*, 122 S. Ct. 2288 (2002), in which the Supreme Court of Virginia struck down a cross-burning statute as overbroad. Pet. 20 n.11. Significantly, the Commonwealth of Virginia's petition for writ of certiorari in that case did not raise, or even suggest, applying the novel limitation to overbreadth challenges asserted in this petition. Instead, that petition attacked the decision on the ground that the statute at issue did not prohibit constitutionally-protected expression. *See, e.g.*, Petition for Writ of Certiorari 28 n.16, *Virginia v. Black*, No. 01-1107 (explaining that overbreadth, in a "conventional sense," refers to attacks on a "statute which by its terms bans protected speech," and arguing that the statute at issue did not reach protected speech).

conduct was not proscribed by "that portion of the government policy he challenges as overbroad, but by *other* portions of the policy." Pet. 13 (emphasis in original). The first point is disputable and the second point is incorrect.

1. Petitioner argues that "[t]here is no evidence that the notice barring [Hicks'] return was related to any previous expressive activity." Pet. 13. Nor, however, is there any evidence to the contrary. Neither this Court, nor Hicks, nor the Commonwealth of Virginia for that matter, can possibly know why Hicks was barred from Whitcomb Court because the Housing Authority's policy authorizes its Housing Manager to prohibit anyone from entering the streets surrounding Whitcomb Court for any reason, without explaining why. From the record in this case, we know only that Hicks was notified that he was barred from these streets, and that his two oral requests to have that bar lifted were denied. The absence of evidence explaining why Hicks is barred from the area is part and parcel of the trespass policy's constitutional defect: Because the Housing Manager has unfettered discretion to choose who can have access to the streets and sidewalks around Whitcomb Court, she need not create any record reflecting the basis of her decision to bar Hicks, or anyone else, from that property.

2. Contrary to Petitioner's assertion, Hicks was arrested for violating the very same provisions of the policy that he challenges as overbroad. The Housing Authority's written policy authorizes "each and every Richmond Police Department officer" to first put on notice, and then arrest, "any person" found on Whitcomb Court's newly-privatized streets who "cannot demonstrate a legitimate business or social purpose for being on the premises." Pet. App. 98. The Supreme Court of Virginia struck down the policy on the ground that Rogers, the Housing Authority's agent, has "unfettered discretion" under the policy to determine who has a

"legitimate business or social purpose" and who does not. Pet. App. 13-16. She exercised that discretion to bar Hicks from the property and to refuse his requests to be allowed to return, and it was these decisions that led to his conviction for trespass. Rogers is free to bar any nonresident from entering Whitcomb Court for any reason, or even no reason at all, regardless of their purpose in being there. Thus, the very same policies and procedures that led to Hicks being barred from Whitcomb Court can be applied to bar individuals who wish to engage in constitutionally-protected activity on that property.

C. This Court Cannot Establish Prudential Limitations On Standing To Make Overbreadth Challenges In State Courts.

Aside from the factual obstacles to reaching petitioner's first question presented, this case is not the proper vehicle for an examination of a defendant's *standing* to challenge a statute as overbroad because it arises in a state, not a federal, court. In making an overbreadth challenge, a party claims third party (*jus tertii*) standing to argue that a statute violates the rights of others. A party who is charged with violating a statute has standing in the constitutional sense to make a facial challenge to that statute: The party has an injury in fact, caused by the statute, that would be remedied should the statute be found unconstitutional. *See* Richard H. Fallon, Jr., "Making Sense of Overbreadth," 100 Yale L. J. 853, 869 (1991). Federal courts may, of course, establish prudential limits on standing for themselves, and if this case arose in a federal court then this Court could consider whether to narrow existing prudential limitations on standing to make overbreadth challenges. But those limits should not be imposed on the states. As this Court has explained "if a state court has reached the merits of a constitutional claim, invoking prudential limitations on [the respondent's] assertion of *jus tertii* would serve no functional purpose" because "state courts need not apply prudential notions of standing created by this Court." *City*

of Chicago v. Morales, 527 U.S. 41, 55 n.22 (1999) (internal citations and quotations omitted).

D. Petitioner's Proposed Rule Would Undermine The Role Of The Overbreadth Doctrine To Invalidate Statutes That Chill First Amendment Rights.

Putting aside the numerous factual and procedural barriers that would prevent this Court from reaching the question presented, this Court should not grant the writ because petitioner's proposed limitations on overbreadth challenges would undermine the very purpose of the overbreadth doctrine: to invalidate expansively-worded laws that chill First Amendment expression.

Overbreadth is an exception to the general rule that the party before the Court can only complain of a law's application to his or her conduct. Laws that invade First Amendment freedoms are treated differently, however, because "the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). As this Court has explained:

> Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

Id. In short, the very reason for permitting facial challenges is to enable parties whose activity is *not* protected by the First Amendment to challenge laws on the ground that they have a chilling effect on the speech rights of others. Requiring a nexus between the challenger's conduct and the law's unconstitutional application is thus inconsistent with the doctrine's basic prophylactic purpose.

Furthermore, this Court has already established limits on overbreadth challenges. Such challenges can only be applied to laws that have a "substantial impact on conduct protected by the First Amendment," *Morales*, 527 U.S. at 52-53, because these laws would, if let stand, have a significant chilling effect on constitutionally-protected activity. In light of the overbreadth doctrine's prophylactic purpose, it makes perfect sense to limit its application to statutes that chill significant amounts of speech, rather than, as petitioner suggests, limiting it to defendants whose conduct is in some way related to the statute's unconstitutional application.

II. THE QUESTION WHETHER THE GOVERNMENT HAS GREATER LATITUDE TO IMPINGE ON FIRST AMENDMENT RIGHTS WHEN ACTING AS LANDLORD IS NOT PRESENTED IN THIS CASE.

Petitioner's second question presented also fails to raise an issue worthy of this Court's review. Petitioner argues that this Court should resolve the "conflict" among the federal and state appellate courts on the issue whether the government has "broader discretion" to restrict free expression when acting as landlord than when acting as sovereign. Pet. 21.

A. Petitioner Did Not Preserve This Issue For The Court's Review.

Petitioner never raised this argument below, and thus it was not addressed in any of the decisions issued by the Virginia courts in this case. Petitioner cannot reasonably criticize the lower courts for failing to "acknowledge" the purported "distinction" between government as landlord and government as sovereign when petitioner failed to do so as well. Pet. 21. Petitioner did not preserve this issue and review should be denied on that ground alone. *See, e.g., Adickes*, 398 U.S. at 147 n.2 ("Where issues are neither raised before nor considered by the court below, this Court will not ordinarily consider them.").

B. The Question Whether The Government Has Additional Leeway To Restrict Speech When Acting As Landlord Is Irrelevant To This Case.

In any case, the government's status here is irrelevant. Even if there is a constitutionally significant distinction between government as landlord and government as sovereign, it plays no role in this case, where the issue is whether the government can give itself standardless discretion to ban any and all *speech* on traditional public fora such as streets and sidewalks.

Petitioner asserts that this Court's decision in *Department of Housing and Urban Development v. Rucker*, 122 S. Ct. 1230 (2002), suggests such a distinction between landlord and sovereign. Pet. 21. In *Rucker*, this Court held that when the government is acting to deprive individuals of an interest in government property — specifically, their interest in remaining tenants in subsidized, government-owned housing — the government is subject to fewer restrictions when acting in its capacity as landlord. *Id.* at 1236. The Court relied in part on the fact that the tenants had signed leases with the government acknowledging the terms on which they possessed the property, and acknowledging that a violation of those terms could result in their eviction. *Id.* *Rucker* did not concern government restrictions on speech, and did not address the government's authority to prohibit constitutionally-protected conduct on streets and sidewalks. Moreover, if the Virginia Supreme Court had applied *Rucker's* landlord/sovereign distinction to this case, its decision would have been at odds with this Court's holding that "[r]egulation of speech activity on governmental property that has been traditionally open to the public for expressive activity, such as public streets and parks, is examined under strict scrutiny." *United States v. Kokinda*, 497 U.S. 720, 726 (1990). In short, this Court has never held that the government can, simply by "privatizing" public streets, impose restrictions on speech that would be unconstitutional if it were acting in its capacity as sovereign rather than as

proprietor.

Petitioner cites five cases in which it contends that lower courts applied its landlord sovereign distinction to uphold trespass policies. None of these cases establishes that the government has broader discretion to restrict free speech when acting as landlord, and, more to the point, none establishes that the government can grant itself boundless discretion to prohibit speech on formerly public streets that it has purported to privatize.

a. Washington

In *City of Bremerton v. Widell*, 51 P.3d 733 (Wash. 2002), the Supreme Court of Washington examined a trespass policy that applied to the "common grounds" of government-owned housing and barred only those individuals who engaged in a list of prohibited activities (fighting, making loud noise, etc.). The court upheld the policy against an overbreadth challenge because it concluded that no aspect of the policy "imping[ed] on First Amendment activities." The court said nothing about the government's latitude to restrict constitutionally-protected activity when acting as landlord. Thus, the decision does not conflict in any way with that of the Supreme Court of Virginia in this case.

b. Minnesota

In *Minnesota v. Holiday*, 585 N.W.2d 68 (Minn. App. 1998), a defendant convicted for violating a trespass ordinance challenged the ordinance on overbreadth grounds. The court reversed defendant's conviction because the state's broad reading of the ordinance raised serious First Amendment concerns. The court stated that "it is true that the government . . . has the right to limit access to its property," but nonetheless held that the state could not apply the trespass ordinance to "exclude Holiday from property occupied by many individuals, covering significant

sections of the city" because such a "sweeping restriction" raised serious First Amendment concerns. 585 N.W.2d at 71. Indeed, the Minnesota Supreme Court explained that it would have been forced to invalidate the ordinance had it not found a way to narrow its construction and reverse the trespass conviction before it. *Id.* at 70-71. Therefore, the court's opinion is fully consistent with the Supreme Court of Virginia's decision in this case.

c. Sixth Circuit

Thompson v. Ashe, 250 F.3d 399 (6th Cir. 2001), concerned a public housing authority's policy of maintaining a list of individuals barred from entering the housing authority's residential rental property. Individuals were placed on the "no-trespass" list if "reliable information" demonstrated that they had been involved in drug activities or violent criminal activities that posed a threat to the residents and property. 250 F.3d at 403. Thus, the no-trespass policy at issue in *Thompson* is distinguishable from Richmond's policy because it was limited to individuals who were involved in criminal activities and who entered the residential property itself, rather than the streets adjacent to that property. Moreover, Thompson did not raise an overbreadth challenge to the law, but instead claimed, *inter alia*, that the policy violated his right to associate with his family. The Sixth Circuit upheld the policy without declaring that the government had broader latitude to impinge on First Amendment rights in its capacity as landlord. Thus, the decision does not create a conflict with the holding below, and, more to the point, does not remotely raise the landlord sovereign distinction upon which petitioner seeks review.

d. Eleventh Circuit

In *Daniel v. City of Tampa*, 38 F.3d 546 (11th Cir. 1994), the Eleventh Circuit upheld a

trespass-after-warning statute specifically because it applied only to the housing authority's residential property itself, not the streets and sidewalks around that property. *Id.* at 548 n.3 ("Although access to the Housing Authority property is limited, the City-owned streets and sidewalks surrounding and intersecting with the Housing Authority property are open to the public."). Because residential property, unlike streets and sidewalks, are not public fora, the court concluded that individuals did not have a right to engage in First Amendment expression on that property. Thus, *Daniel* does not conflict with the decision by the Virginia Supreme Court in this case. *See* Pet. App. 39 (distinguishing *Daniel* from this case because the public had "unlimited access to the city-owned streets and sidewalks adjacent to the housing complex.") (citing *Daniel*, 38 F.3d at 550).

c. Vacated Fifth Circuit Panel Decision

A panel of the Fifth Circuit struck down a trespass-after-warning statute as an unreasonable restriction on the First Amendment rights of residents to receive information, a decision that has subsequently been vacated for *en banc* review. *Vasquez v. Housing Authority of the City of El Paso*, 271 F.3d 198, 203 (5th Cir. 2001), *vacated and reh'g en banc granted sub nom. De La O v. Housing Authority*, 289 F.3d 350 (5th Cir. 2002). Because that decision has been vacated, it cannot establish a split in authority on any issue. In any case, the Fifth Circuit panel's decision *striking down* the statute on First Amendment grounds certainly does not provide any authority for petitioner's view that the Richmond policy is constitutional.

* * *

As the above review demonstrates, none of the cases cited by petitioner supports the view that the government has greater latitude to restrict First Amendment rights on streets and

sidewalks that it has purported to privatize. That is not surprising, because the government's status as landlord is irrelevant to its authority to restrict constitutionally-protected activities on traditionally public fora such as streets and sidewalks.

III. RESPONDENT HAS RAISED SEVERAL OTHER CHALLENGES TO THE TRESPASS POLICY THAT WOULD PREVENT THIS COURT FROM REACHING THE QUESTION PRESENTED.

Hicks' overbreadth challenge is only one of several grounds on which Richmond's policy is unconstitutional. Below, Hicks argued 1) that the policy was an unconstitutional infringement of First and Fourteenth Amendment rights because it regulated speech and activity in a public forum and was not narrowly tailored to achieve a compelling government interest, Hicks S. Ct. Br. 11-12; and 2) that Richmond's policy violate the right to intimate association guaranteed by the First and Fourteenth Amendment, *see* Hicks' S. Ct. Br 17-22. If this Court grants the petition, Hicks will raise these other grounds as a basis for affirming the decision below, which could prevent this Court from reaching the question presented. These alternative grounds for affirmance provide yet another reason for this Court to deny the petition.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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November 21, 2002

(3)

Supreme Court, U.S.
FILED
DEC 4 2002
OFFICE OF THE CLERK

No. 02-0371

In The

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

KEVIN LAMONT HICKS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Virginia

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Respondent's brief in opposition fails to raise any doubt whatsoever about the need for this Court to review the decision below. Respondent does not and cannot contest that the first question presented by the petition – whether a criminal defendant may invoke the overbreadth doctrine when he was not engaged in expression and his conduct was not proscribed by the unwritten policy he seeks to challenge – is an important federal question that has not been, but should be, decided by this Court. Quite simply, this Court, having created the overbreadth doctrine as an exception to the general rules of Article III standing, should articulate clear limits on when a criminal defendant may invoke the doctrine to avoid conviction. Further, respondent does not and cannot refute the fact that the second question – whether, in the context of the government's attempts to exclude some non-residents from a public housing complex, the Constitution recognizes a distinction between actions undertaken by government as landlord and actions taken by government as sovereign – has divided the federal courts of appeal and the state appellate courts. Nor does respondent dispute that the decision below, which didn't recognize the distinction, is in conflict with this Court's decision in *Department of Hous. and Urban Dev. v. Rucker*, 535 U.S. 125 (2002), which recognized such a distinction in the context of eviction from public housing. In sum, respondent implicitly concedes that these issues are worthy of this Court's review.

Respondent opposes this Court's review only by contending that this case is not a good vehicle for resolving these fundamental issues. In doing so, the respondent (1) misconstrues the arguments below, (2) misstates clearly established facts, (3) misapprehends decisions of other courts, and (4) misunderstands the law. Once the flaws in

respondent's contentions are exposed, it becomes clear that review should be granted.

1. Respondent misconstrues the nature of the arguments below when he insists that Virginia has failed to preserve either issue. To the contrary, both issues were addressed below and, thus, are properly preserved for review by this Court.

a. First, the issue of whether a criminal defendant may invoke the overbreadth doctrine when he was not engaged in expression and his conduct was not proscribed by the unwritten policy he challenged is essentially a question of whether respondent can bring an overbreadth challenge. This question was litigated extensively in the lower court. Indeed, the majority opinion explicitly acknowledges that Virginia argued "Hicks is not entitled to challenge the constitutional validity of the Housing Authority's practices or policies in the criminal prosecution for trespass." *See* App. at 7. The dissenting opinion begins by stating "[t]he majority reaches this issue by allowing the defendant to make a facial challenge to the Authority's trespass policy. I do not believe that such a challenge is permissible in this case." *Id.* at 17. In other words, whether respondent could bring an overbreadth challenge was a question raised and decided below. Thus, the issue is fully preserved for this Court's review.

b. Second, the issue of whether, in the context of the government's attempts to exclude some non-residents from a public housing complex, the Constitution recognizes a distinction between actions undertaken by government as landlord and actions taken by government as sovereign is essentially a question of whether sidewalks within Whitcomb Court, a public housing complex, are constitutionally different from common ordinary sidewalks along a public street. This issue, too, was litigated extensively in the lower court. Indeed, a bare majority of the Virginia

Court of Appeals based its entire en banc decision on the absence of such a distinction. App. at 43. The Virginia Supreme Court majority decided the case on overbreadth grounds and, therefore declined to reach the question. *Id.* at 16. Thus, the issue is fully preserved for this Court's review.

2. Respondent misstates the clear factual record in this case. Respondent's brief suggests that, when he was arrested, he was on a public sidewalk outside of Whitcomb Court, that he was engaged in expressive activity, and that he intended to engage in activity that was explicitly prohibited by the unwritten policy he challenged as overbroad. However, a careful examination of the undisputed facts in this case reveals the exact opposite to be true. At the time of his arrest, the respondent was inside Whitcomb Court, was not engaged in expressive activity, and did not intend to engage in an activity reached by the unwritten policy challenged.

a. First, respondent suggests that he was not within the public housing complex, but on the sidewalk of a public street adjacent to the public housing complex when he was arrested. Resp. at i, 1, 3. The suggestion is inaccurate. When the respondent was arrested, he was on a sidewalk adjacent to Bethel Street. App. at 6. As the lower court noted, "Bethel Street is one of the streets that the City conveyed to the Housing Authority and that *street is located entirely within Whitcomb Court.*" *Id.* (emphasis added). Any doubt about the correctness of the lower court's conclusion is eliminated by an examination of the map of Whitcomb Court set out on page 97 of the Appendix. The map shows clearly that Bethel Street begins and ends at the borders of the Whitcomb Court housing complex. Thus, any suggestion that respondent was not on the property of Whitcomb Court is simply wrong.

b. Second, respondent implies that he was engaged in expressive conduct when he was arrested. *See* Resp. at 7.

The implication is untrue. At the time of his arrest, respondent claimed to be there "to bring pampers for his baby." App. at 61. However, there is no evidence that the officer saw any pampers, and no other evidence corroborating respondent's claim that he was engaged on such an errand. Even if respondent was delivering diapers to the mother of his child, such activity is not expression and does not implicate a fundamental right. *See Thompson v. Ashe*, 250 F.3d 399, 407 (6th Cir. 2001) ("The Court has not extended constitutional protection to mere visitation with family members"). Thus, respondent was not engaging in constitutionally protected conduct.

c. Third, respondent claims that he intended to engage in conduct that was proscribed by the government policy that the lower court found to be overbroad *See* Resp. at 7-8. This claim is false. As a careful review of the majority opinion makes clear, the lower court did not find the written policy prohibiting persons "who cannot demonstrate a legitimate business or social purpose for being on the premises" to be overbroad. Rather, the lower court found overbroad the *unwritten* policy that required advance approval for leafleting, an activity that generally is constitutionally protected. App. at 15-16. There is no evidence that the respondent had engaged in leafleting in the past or that he intended to do so in the future. Thus, he cannot claim that he intended to engage in the conduct proscribed by the unwritten policy that the lower court found overbroad. Moreover, there is no evidence that the Respondent had a constitutionally protected purpose for visiting Whitcomb Court at the time of his arrest. As noted above, "mere visitation with family members" does not implicate a constitutional right. *See Thompson*, 250 F.3d at 407. This is especially so when, as here, there is no evidence that his mother, the mother of his child, or any other resident of Whitcomb Court invited him on the premises.

In sum, the record establishes that respondent was arrested on the property of a public housing complex, that he was not engaged in protected activity at the time he was arrested, and that he had no intention of engaging in the sort of expressive activity reached by the unwritten policy found to be overbroad by the court below. Given these undisputed facts, this Court can resolve both of the questions presented for review.

3. Respondent misapprehends the scope of the decisions of federal courts of appeal and state appellate courts on these questions when he asserts that there is no conflict among them. To the contrary, a review of the cases indicates a clear and broad conflict. For example, in *Thompson* and *Daniel v. City of Tampa*, 38 F.3d 546 (11th Cir. 1994), the Sixth and Eleventh Circuits held that application of trespass after warning statutes by public housing authorities was constitutional. *See Thompson*, 250 F.3d at 408; *Daniel*, 38 F.3d at 550. In contrast, the court below held that the application of Virginia's trespass after warning statute to an individual who was within Whitcomb Court was unconstitutional. Similarly, in *City of Bremerton v. Widell*, 51 P.3d 733 (Wash. 2002) and in *Minnesota v. Holiday*, 585 N.W.2d 68 (Minn. App. 1998), state appellate courts held that a government-owned housing complex generally could exclude trespassers from the premises. *See Widdell*, 51 P.3d at 741; *Holiday*, 585 N.W.2d at 71. In contrast, the court below held that a person, who had been convicted of trespass in the past and had been told not to return, could not be convicted of trespass when he was discovered clearly within the property of Whitcomb Court. In short, the result below, that a non-resident may not be excluded from the property of a public housing complex after being warned not to return, is directly contrary to the broad holdings of two federal courts of appeal and the state appellate courts in both Washington and Minnesota. The only decision that remotely agrees with the court

below has been vacated and the matter set for rehearing en banc. *See Vasquez v. Hous. Auth. of El Paso*, 271 F.3d 198, 203 (5th Cir. 2001), *vacated and reh'g en banc granted sub nom. De La O v. Hous. Auth.*, 289 F.3d 350 (5th Cir. 2002).

More importantly, decisions of other courts have recognized, at least implicitly, that there is a constitutional distinction between the government acting as sovereign and the government acting as the landlord of a residential apartment complex. Their decisions acknowledge that rules and regulations that may not be constitutional when applied to society as a whole are both constitutional and appropriate when applied to a residential apartment complex owned and operated by a governmental entity. In contrast, the court below implicitly treated the sidewalks within Whitcomb Court the same as sidewalks along the public city streets. Such a result contradicts *Rucker* and the holdings of other federal and state appellate courts. This Court should grant review to resolve the conflict.

4. Respondent misunderstands the law. Respondent contends that because this case arose in *state* court, this Court may not determine whether he may invoke the overbreadth doctrine. Resp. at 8-9. Respondent also contends that there are numerous alternative grounds for declaring the Housing Authority's policy unconstitutional and, thus, a review by this Court will not reach the questions presented. Resp. at 15. As a matter of law, neither of these contentions is correct.

a. First, the fact that a case arises in state court is irrelevant to the application of substantive *federal* constitutional law. This case arose in state court because respondent was being prosecuted for violation of the state's criminal trespass law. But respondent chose to raise federal constitutional defenses. State courts, like the lower federal courts, must follow the decisions of this Court in

resolving federal constitutional issues, including the overbreadth doctrine. The federal Constitution does not mean one thing in the lower federal courts and another in the state courts. While the Virginia Supreme Court is free to devise its own general rules of standing in its own courts, and to devise its own standards for a *state* overbreadth doctrine, it did not purport to do so here. Indeed, it expressly relied on what it perceived to be this Court's overbreadth doctrine. App. 8-15. It is well-established that a state court "may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them." *Oregon v. Hass*, 420 U.S. 714, 719 (1975) (emphasis original). Yet, because it misunderstood this court's jurisprudence, the Virginia Supreme Court did impose greater restrictions – as a matter of federal law – than are warranted by the jurisprudence. It expanded the scope of the federal overbreadth doctrine in an unprecedented manner. The fact that the lower court is a state tribunal does not preclude this Court from reviewing its erroneous application of a federal constitutional standard. *See* 28 U.S.C. § 1257 ("Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States . . . ").

Moreover, respondent's position, that state courts can impose different standards for the application of federal constitutional law, is a recipe for constitutional chaos. The vast majority of criminal cases arise in the state courts. *Michigan v. Long*, 463 U.S. 1032, 1042 (1983). To the extent that those cases raise federal constitutional issues, the "state courts are required to apply federal constitutional standards, and they necessarily create a considerable body of 'federal law' in the process." *Id.* Because of the

need for a uniform body of federal constitutional law, "ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action." *Id.* at 1041. Consequently, this Court cannot allow the state courts to apply varying standards for the application of federal constitutional law. Indeed, the fact that the lower court did so is a compelling reason for granting review. Accordingly, it is no jurisdictional barrier to this Court's consideration of the case.

b. Second, there are no alternative grounds for declaring the Housing Authority's unwritten policy unconstitutional. Respondent argued below that the *sidewalks along a street closed to the public and completely within a public housing authority* constituted a public forum. However, no decision of this Court supports such an argument.[1] Indeed, this Court has cautioned that not all sidewalks constitute a public forum, *United States v. Grace*, 461 U.S. 171, 179-80 (1983), and that the "mere characteristics of the property cannot dictate forum analysis." *United States v. Kokinda*, 497 U.S. 720, 727 (1991). Moreover, the only federal appellate court to address the issue concluded that property within a public housing complex is not a public forum. *See Daniel*, 38 F.3d at 550. Furthermore, even if this Court

[1] The fact that this Court has never resolved the question and that Respondent has indicated an intention to raise it if review is granted actually provides further support for granting review, especially because this additional question falls squarely within the second question presented. Quite simply, if review is granted, this Court will have the opportunity to resolve another important federal question that has not been, but should be, decided by this Court. Alternatively, the Court could resolve the other questions presented and remand the case to the Virginia Supreme Court for it to consider this issue in light of the decision in *Rucker*.

determined that sidewalks within a public housing complex constituted a public forum, this Court would still have to resolve whether the overbreadth doctrine permits respondent, who was engaged in criminal trespass and not in any constitutionally protected conduct, to bring a challenge to the Housing Authority's policy.

Additionally, respondent argued below that the Housing Authority's policy violates his right to intimate association. However, this Court has not extended constitutional protection to "mere visitation with family members" or friends. *Thompson*, 250 F.3d at 407. Thus, there is no constitutional right implicated. Furthermore, even if this Court determined that there is a constitutional right to visit family members or friends, there is no suggestion in this case that the mother of respondent's child or his own mother, both of whom are residents of Whitcomb Court, invited or welcomed respondent's visit. Nor is there any evidence that any other resident of Whitcomb Court wished to associate with respondent. Consequently, even if there is a right to visit family and friends, respondent lacks standing to bring such a claim.

In sum, this case presents an excellent vehicle for resolving the questions presented. It provides the Court an opportunity to define the limits of overbreadth standing and to determine the scope of the distinction between government acting as landlord and government acting as sovereign established in *Rucker*. Both issues were presented and, at least implicitly, decided below. The clear factual record indicates that the Respondent was within Whitcomb Court, was not engaged in expressive conduct, and did not intend to engage in conduct that violated the unwritten policy he challenged. Neither the fact that this case arises from state court nor respondent's proposed alternative grounds for affirmance preclude this Court

from reaching the merits of the issues. Accordingly, review should be granted.

CONCLUSION

For the reasons stated above, in the petition for writ of certiorari, and in the *amicus* brief, the petition for writ of certiorari should be granted.

Respectfully submitted:

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December 3, 2002

MOTION FILED
OCT 9 2002

No. 02-371

(2)

In The Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

KEVIN LAMONT HICKS,

Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE SUPREME COURT OF VIRGINIA

BRIEF OF *AMICI CURIAE* CITY OF RICHMOND AND RICHMOND REDEVELOPMENT AND HOUSING AUTHORITY IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND STATEMENT OF INTEREST

Pursuant to Rule 37(2)(b) of the Rules of this Court, the City of Richmond and the Richmond Redevelopment and Housing Authority ("RRHA") respectfully move this Court for leave to file the attached brief *amicus curiae* urging that the Commonwealth of Virginia's Petition for Writ of Certiorari in this case be granted, and that the Supreme Court of Virginia's decision in Hicks v. Commonwealth, 563 S.E.2d 674 (Va. 2002), be reversed. The consent of counsel for the petitioner has been obtained. The consent of counsel for the respondent was sought, but withheld.

Richmond is the capital and fourth largest city in the Commonwealth of Virginia. Through the ongoing efforts of City Council and various departments and agencies, the City of Richmond works to provide for, and improve, the security and well-being of the almost 200,000 citizens living within its boundaries. Pursuant to § 2.04 of its Charter, the City of Richmond has the "power to adopt ordinances . . . for the preservation of the safety, health, peace, good order . . . [and] welfare of its inhabitants . . . ." Section 2.03(a) of this Charter specifically authorizes it to close public streets, and Va. Code Ann. § 15.2-2006 confers the additional ability for the City to alter or vacate public rights-of-way either upon the motion of City Council or the application of a person.

Richmond City Ordinance No. 97-181-197, which closed and privatized certain interior streets in the Whitcomb Court housing development so that the City's right and title in these streets could later be deeded over to RRHA, was adopted by Richmond City Council under the authority duly granted by City Charter §§ 2.03 and 2.04, and Va. Code Ann. § 15.2-2006. This street privatization effort directly led to the implementation of the RRHA trespass-barment policy that was erroneously stricken below as being overbroad and

violative of the First Amendment of the Constitution of the United States.

Created by Richmond City Council in 1940, RRHA is the largest public housing authority in the Commonwealth of Virginia. Its mission includes the provision of quality and affordable housing to low- and moderate-income tenants, the promotion of their self-sufficiency and economic betterment, the revitalization and elimination of blighted areas within the City, and the prudent oversight of growth and conservation programs designed to improve the overall quality of life in urban neighborhoods and environments.

Through an array of programs and in collaboration with the City of Richmond, the Commonwealth of Virginia, and other interested parties, RRHA actively seeks on a daily basis to prevent violence and criminal activity in its various communities, promote safe and secure dwellings and living conditions, and provide opportunities in which law-abiding tenants can empower themselves and realize their economic and educational potentials, as well as their dreams of home ownership.

In recent years, RRHA has won regional and national awards for the innovative measures that it has undertaken to advance these worthy objectives. Its diverse programs have achieved public recognition and prominence. They serve as models that public housing agencies across the country have studied and implemented. The United States Department of Housing and Urban Development has consistently labeled RRHA a "recognized performer" based upon standards that RRHA has set and surpassed both for itself and for others.

RRHA's housing operations cover sixteen housing developments for low-income families, nine developments for low-income elderly and the disabled, and scattered-site single-family homes and special housing units throughout the City of Richmond. Through its approximately 350 employees, RRHA manages over 4,000 public housing units in the City and provides subsidized housing in over 2,700 of these units. In all, RRHA serves approximately 12,000 public housing residents, and its programs directly serve and benefit over 33,000 Richmonders.

RRHA, in conjunction with City officials, formulated the trespass-barment policy for its communities as part of an ongoing front-line effort to rid public housing neighborhoods of criminal activity (often violent and drug-related) that is all too frequently committed by non-tenants and non-residents with no lawful purpose for being present on RRHA property.

The attached brief *amicus curiae* that RRHA and the City of Richmond seek to file explains the origin of RRHA's trespass-barment policy. It demonstrates that this policy, in conjunction with other law enforcement programs, lowered the incidence of violent and non-violent crime in Whitcomb Court without chilling free speech or impeding the exercise of other First Amendment rights and freedoms. This policy, as well as the City ordinance that preceded its realization, is a vital element of collaborative crime prevention and crime reduction efforts in Richmond on the local, state, and federal levels. These two directives must be viewed in this context.

Although a majority of the Supreme Court of Virginia held that the trespass-barment policy was unconstitutionally overbroad, its final order vacated the intermediate appellate court's *en banc* discussion about whether the privatized streets of Whitcomb Court constituted a public forum. This Court has repeatedly confirmed through its holdings that a public forum analysis is central and mandatory to any finding of overbreadth. The refusal to engage in such an analysis below not only conflicts with the well-settled decisions of this Court (and other state and federal courts across the United States), but also reflects such

a departure from the accepted and usual course of judicial proceedings that the exercise of this Court's supervisory power is required to resolve the conflict created on this important issue of federal law.

The Commonwealth's Petition for Writ of Certiorari cogently discusses the need for clarifying the law of standing for overbreadth challenges, as well as the equally compelling need to resolve the already-existing split in federal and state authority that has been perceptibly widened by the decision below. The attached brief *amicus curiae* complements that analysis by discussing additional relevant matter that will be of help in this Court's decision whether to grant a writ in this case.

WHEREFORE the City of Richmond and the RRHA respectfully request that this Court grant them leave to file the attached brief *amicus curiae* in support of the Petition for Writ of Certiorari.

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INTRODUCTION AND STATEMENT OF ADDITIONAL RELEVANT FACTS[1]

During the twelve-year period preceding the adoption of City Ordinance No. 97-181-197, and the development of RRHA's trespass-barment policy, Richmond was notoriously known as "the murder capital of Virginia"[2] and "one of the nation's murder capitals."[3]

The reasons underlying the creation of this "national Murder City image"[4] are amply confirmed by crime statistics published annually by the Federal Bureau of Investigation. In 1985, Richmond was ranked third among American cities for the number of homicides per 100,000 people.[5] The following year, "crack cocaine came to town and homicides increased sharply."[6] Between 1986 and 1997, Richmond's per capita homicide rate ranked perennially among the top ten in the nation, fluctuating between seventh place (1986)[7] and second place (1994 and 1997).[8] Its rate was consistently

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[1] In accordance with Supreme Court Rule 37.6, *amici* represent that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici*, has made any monetary contribution to the preparation or submission of this brief.

[2] Gary Robertson, For the Media: 'A Feeding Frenzy'; Reaction Soon Overshadowed Event, Richmond Times-Dispatch, June 21, 1998, at A-1.

[3] Carrie Johnson, Crime That's Often Lost; No Easy Definitions or Answers to Rape, Richmond Times-Dispatch, Aug. 24, 1998, at A-1.

[4] Mark Holmberg, Richmond on Top of Crime; 'It's a Phenomenal Turnaround,' Renaissance Executive Director Says, Richmond Times-Dispatch, Jan. 3, 2000, at B-1.

[5] Michael Martz, City Man's Death Sets Homicide Record, Richmond News Leader, Dec. 30, 1989, at 1.

[6] Mark Holmberg and Jim Mason, 10 Slayings in City in First 15 Days of '97 a Bloody Beginning, Jan. 16, 1997, at B-1.

[7] Martz, *supra* note 5.

[8] Gordon Hickey, FBI Numbers Confirm Trend; Richmond No. 2 in '94 Murder Rate, Richmond Times-Dispatch, May 22, 1995, at A1; Gordon Hickey, Violent Crimes Drop in City; Clearance Rate Up; Police Work Praised, Richmond Times-Dispatch, Apr. 28, 1998, at A-1.

the highest in the Commonwealth of Virginia over this same period.[9]

Commentators and City residents have stated various rationales for Richmond's ranking, the most common being the increased prevalence and mix of drugs and guns on City streets.[10] One reporter observed that "locals tend to blame it mostly on drug-related killings, especially in and around the housing projects."[11]

Richmond's alarmingly high homicide rates attracted the attention of national public housing officials, prompting former Secretary of Housing and Urban Development Henry Cisneros to urge action so that "'public housing [in Richmond and elsewhere] is no longer a safe harbor for criminals.'"[12]

Federal agencies continued to assist Richmond with their law enforcement efforts. For example, HUD named the City in 1990 as one of twenty that would receive funds for a program designed to "seize the public housing leases of alleged drug dealers or people believed involved in the drug trade."[13] In 1994, HUD awarded RRHA a $1.1 million grant

[9] *See* Gordon Hickey, Gunshot Treatment Costs High, Richmond Times-Dispatch, Mar. 14, 1999, at A-6.

[10] Brian Kelley, City May Set Two Homicide Records, Richmond Times-Dispatch, Oct. 22, 1990, at A1.

[11] Ray McAllister, Using the Police Ball to Make a Statement, Richmond Times-Dispatch, Oct. 8, 1993, at B1. Unfortunately, there is evidence to support this perception. *See, e.g.*, Gordon Hickey, Homicides Found to Occur Mostly in Housing Projects, Richmond News Leader, Aug. 11, 1990, at 17 ("Although about 6 percent of Richmond's population lives in housing-project areas, about 41 percent of the city's homicides during the first half of 1990 were committed in them.").

[12] Editorial, Gilpin's Heroes, Richmond Times-Dispatch, Feb. 18, 1994, at A14.

[13] Randolph Goode & Peter Hardin, Drug Eviction Notices Are Filed in Richmond, Richmond News Leader, June 26, 1990, at 1.

for increased police presence in eight public housing projects plagued by drug trafficking.[14] And in 1995, Richmond was given one of two federal grants awarded by the United States Bureau of Justice Assistance "to develop and implement a strategy to reduce homicides in the city and to increase the number of cases solved . . . ."[15]

Despite the increased resources that were deployed to combat these evils, violent crime and drug-related activities continued in RRHA-managed neighborhoods and other parts of the City. Indeed, "[t]he first six months of 1994 was the deadliest half-year in Richmond's history, as 78 people were shot, stabbed, bludgeoned or scalded to death by killers as young as 14 years old."[16] These killings were "fueled largely by arguments, drugs, alcohol and greed."[17] In fact, the "carnage on some of Richmond's streets" was so appalling that the Chairman of the City School Board called for the declaration of martial law, stating: "'Bring in the National Guard, federal troops, whatever we need to get our community back . . . . Ladies and gentlemen, the house is on fire.'"[18]

This tragic situation posed serious consequences for the many law-abiding residents and tenants of public housing developments. Recognizing their plight, RRHA and the City decided that they would work together to convert Richmond

[14] Area/State, Grant to Provide Officers, Richmond Times-Dispatch, Oct. 9, 1994, at B9.

[15] Dorine Bethea, City Gets $350,000 Grant to Plan Strategy for Curbing Homicides, Richmond Times-Dispatch, Dec. 13, 1995, at B-1.

[16] Mark Holmberg, First Half of '94 Sets Homicide-Rate Record, Richmond Times-Dispatch, July 5, 1994, at A1.

[17] *Id.*

[18] Gordon Hickey, 'Full Alert' Sounded for Troubled Areas, Richmond Times-Dispatch, Aug. 11, 1994, at A1.

from "one of the nation's bloodiest cities into a model of crime-fighting prowess."[19]

The Development of the Trespass-Barment Policy

Understanding that the majority of crimes occurring in public housing were committed by outsiders[20] – especially by persons who had no legitimate business or social purpose for being in its developments – RRHA implemented a no-trespassing policy in the Gilpin Court[21] neighborhood in 1990. It was designed to promote the official enforcement of existing state law, *i.e.*, Va. Code Ann. § 18.2-119 ("Trespass after having been forbidden to do so").

In November 1990, RRHA issued a letter to residents advising them of this "No Trespassing" policy and inviting public questions and comments. Shortly thereafter, workers began to post 250 "No Trespassing" signs throughout Gilpin Court,[22] and RRHA released the following bulletin:

Trespassers Beware!!!

> Beginning November 20, 1990, [RRHA], in conjunction with the Richmond City Police, will begin prosecuting all trespassers in the Gilpin Court public housing community . . . .
>
> Once the new No Trespassing Policy is implemented, all guests of RRHA's Gilpin residents must have a specific destination and will not be allowed to loiter on RRHA properties. Additionally, residents may be asked to verify if an individual is in fact their guest.
>
> Our No Trespassing Policy was proposed by the Gilpin Safe Neighborhood Program Committee, which includes RRHA residents, RRHA staff, community leaders, and the Richmond City Police. We know that the majority of criminal activity that occurs in public housing is conducted by non-residents. This policy, which is part of our continuing effort to make our properties safe and crime-free, will allow residents to control who visits their community.

(emphasis in original) (internal quotation marks and citation omitted). The "No Trespassing" policy continued throughout the mid-1990s and was gradually extended into other RRHA public housing developments.

Although this policy yielded commendable results,[23] it had only limited success because the sidewalks and streets of RRHA housing projects remained public property. Thus, if police officers saw unauthorized persons trespassing upon

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[19] Carrie Johnson & Gordon Hickey, Back from the Brink; Deaths Dip as City Takes Blight Out of Crime, Richmond Times-Dispatch, Oct. 11, 1999, at A-1.

[20] *See* Teresa Lemons, No-Trespassing Policy to Begin in Gilpin Court, Richmond News Leader, Nov. 9, 1990, at 17.

[21] Gilpin Court is the City's oldest public housing neighborhood, and is also the largest such development on the East Coast between Baltimore and Atlanta. Mark Holmberg, Seeing the Light; Inner City Glows in Glitter of the Holiday Season, Richmond Times-Dispatch, Dec. 20, 1998, at B-1; Michael Paul Williams, 39 Take Step in Direction of Success; Welfare-to-Work Program is Hailed, Richmond Times-Dispatch, June 7, 1996, at B-2.

[22] Brian Kelley, Gilpin Court Trespassing Signs Go Up, Richmond Times-Dispatch, Nov. 9, 1990, at B4.

[23] *See* Teresa Lemons, Public Housing Gentry's Calling Now, Richmond News Leader, Feb. 28, 1992, at 19 (discussing the Gilpin Court program and observing that "[p]reliminary police statistics show violent crimes in public housing decreased 5 percent from 1990 to 1991").

RRHA-owned buildings and grounds, these intruders could avoid arrest and prosecution by simply stepping onto an adjacent street or sidewalk. More was needed in order for RRHA to protect the health, safety, and welfare of its tenants.

In a memorandum dated December 16, 1996, Gloria Rogers (Whitcomb Court housing manager) recommended a solution to her superiors – that the streets within that project be privatized. Street privatization promised to achieve the following benefits:

- Eliminating the sale of drugs from streets and sidewalks;
- Holding criminals and those who aid them accountable for unlawful acts;
- Cutting crime in public housing;
- Abolishing open air drug markets; and
- Reducing trash on streets and sidewalks.

Three days later, RRHA officials indicated City police and civic leaders at a public safety meeting that RRHA gradually wanted to "close all public right-of-ways to public use and travel within all of their public housing communities." A formal request followed in February 1997.

The streets of Whitcomb Court were among those that were selected first for privatization. This designation was not accidental. Long known as "one of the city's most violent and troubled housing projects,"[24] Whitcomb Court had been a

[24] Mark Holmberg, Where the Past Blights the Present, Richmond Times-Dispatch, Aug. 30, 1998, at B1.

popular venue for open air drug dealing.[25] One local reporter observed in 1994 that Whitcomb Court was "a neighborhood where crack addicts snap off car antennas to fashion makeshift pipes, a wasteland of stark buildings, trash and weed-and-dirt yards whose only fetching quality is the sparkle of shattered glass under street lights."[26]

In Whitcomb Court, the 2300 block of Bethel Street was especially violent – a block where people were murdered while children played nearby,[27] where major heroin and crack cocaine suppliers set up their shops[28] and dealt drugs within 1,000 feet of an elementary school,[29] where a teenager was shot in the head while simply sitting in a car,[30] and where police might find fifty people – several of them screaming – surrounding a fatality, but no witnesses.[31] Unsurprisingly, the 2300 block of Bethel Street was selected for privatization.

Officials from RRHA and the City further discussed privatization efforts in March 1997. RRHA indicated at that time that City police had "expressed support" for its proposed policy. It stated that "[t]he Police Department is expected to be the primary enforcement unit that will issue summons

[25] Battino Batts Jr., Police Unit is Forcing the Issue: Strike Force Hits Drugs, Arms, Richmond Times-Dispatch, May 2, 1993, at B1.
[26] William Ruberry, Wrestling Richmond's Bad Guys, Richmond Times-Dispatch, May 2, 1994, at A1.
[27] Mark Holmberg, Crime Has Cut a Path Through Her Family: Grandmother Wonders Why It Went So Wrong, Richmond Times-Dispatch, Mar. 11, 1994, at A1.
[28] Alan Cooper, Murder, Drug Dealing Draw 2 Life Terms, Richmond Times-Dispatch, Apr. 25, 1996, at B3.
[29] Randolph Goode, Six Indicted in Whitcomb Court Case, Richmond Times-Dispatch, June 24, 1995, at B1.
[30] Area/State, Two Hurt in Separate Shootings, Richmond Times-Dispatch, Jan. 19, 1993, at B3.
[31] Area/State, South Side Man Killed; Woman, 18, Shot in Head, Richmond Times-Dispatch, July 19, 1990, at B5.

[sic] and arrest persons for violating trespassing rules and other infractions," and that

> [t]he primary focus in [law] enforcement will be to deter street level drug dealing, hanging out on street corners by non-residents and to discourage non-residents from entering public housing communities, except for legitimate social or business reasons.

Later in March, the City's Director of Public Works advised City Council that street privatization should proceed.

In a letter dated April 11, 1997, RRHA's Director of Public Housing verified that if privatization were approved, "RRHA's only intent as owner of the streets, will be to help control . . . traffic that frequents our neighborhoods for illegal or other disruptive purposes." Although residents and school buses could "travel to and from Whitcomb Court as they do now," "the streets [and sidewalks] will clearly be marked as RRHA-owned private property."

The City Planning Commission unanimously voted to recommend approval of the closing of public right-of-ways in Whitcomb Court following a public hearing in May 1997. On May 12, 1997, City Council adopted Ordinance No. 97-143-124, which provided for the privatization of streets and sidewalks in Whitcomb Court. This ordinance was amended on June 23, 1997 by Ordinance No. 97-181-197, so that City police could enforce traffic laws on the privatized streets.

The City renounced its legal interest in the streets and sidewalks of Whitcomb Court by letter dated July 23, 1997. Two days later, the City deeded these thoroughfares over to RRHA, which subsequently authorized City police to enforce state criminal trespass laws on all of its properties.

RRHA erected "No Trespassing" signs on the streets and sidewalks of Whitcomb Court, so that people would know that Whitcomb Court was private property, and that their unauthorized presence there would subject them to arrest.

The Success and Untimely Demise of the Trespass-Barment Policy

Statistical evidence compiled by the Crime Analysis Unit of the Richmond Police Department demonstrates that overall monthly crime rates declined in Whitcomb Court after the trespass-barment policy was implemented.[32]

01/01/96-07/31/97 (17 months before policy effected) [No. per month]	08/01/97-12/31/98 (19 months after policy effected) [No. per month]	01/01/99-06/05/02 (last 42 months policy in effect) [No. per month]
Violent: 2.4	2.1	1.9
Property: 5.6	4.1	4.2
Total: 8.0	6.2	6.1

Under this policy, Kevin Lamont Hicks was arrested twice in 1998 for trespassing in Whitcomb Court. Hicks was barred from Whitcomb Court (and all other RRHA property) in April 1998. He signed the written barment notice that was served on him. That notice stated that if he trespassed on RRHA property in the future, he would be subject to arrest. In January 1999, Hicks was arrested for trespassing on the sidewalk of the 2300 block of Bethel Street by a policeman who knew about Hicks' barment from Whitcomb Court. Hicks was convicted. That conviction was overturned on overbreadth grounds by a majority of the Supreme Court of

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[32] Due to a systems error, violent crimes and property offenses occurring on Deforrest Street during the period 01/01/00-06/05/02 are not included in the third column.

Virginia, which affirmed a sharply-divided *en banc* decision of the Court of Appeals of Virginia.

SUMMARY OF ARGUMENT

The overbreadth analysis conducted by a majority of the Supreme Court of Virginia conflicts with the well-settled jurisprudence of this Court in three principal areas in addition to those set forth in the Petition for Appeal.

First, this Court has held that an individual lacks standing to make an overbreadth challenge if his actions fall within the core of the conduct being regulated. Here, RRHA adopted a trespass-barment policy to reduce and eliminate drug-related and other criminal activity in Richmond public housing, and to prevent outsiders from unlawfully trespassing on RRHA-owned private property after being forbidden to do so. Hicks was twice arrested for trespassing in Whitcomb Court, and a third time for causing property damage in Whitcomb Court. On each occasion, he was found guilty, but his sentence was suspended on the condition that he keep the peace for three years. RRHA officials served Hicks in April 1998 a written notice barring him from entering onto any RRHA properties, including Whitcomb Court. This notice informed Hicks that if he was seen or caught on RRHA property in the future, he would be subject to arrest. Hicks acknowledged his receipt of this notice in writing before multiple witnesses. Because Hicks' conduct falls squarely within that circumscribed by the trespass-barment policy, he lacked standing to raise an overbreadth argument, and the Supreme Court of Virginia erred in striking down that policy solely on that basis.

Second, this Court has repeatedly held that whenever a policy restricts conduct, not speech, that policy may not be stricken as overbroad and violative of the First Amendment unless the overbreadth is both "real" and "substantial as well,

judged in relation to the [policy's] plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). Gloria Rogers testified that the trespass-barment policy was adopted to address tenant concerns about criminal acts committed by outsiders in public housing. The policy was not directed at limiting First Amendment activities, and there was no evidence that it had diminished or even chilled protected speech or conduct. When Hicks was arrested for trespassing in Whitcomb Court after RRHA had validly barred him from coming into that community, he stated that he was delivering diapers to one of his children. This conduct was not entitled to any First Amendment protection as the dissent rightly discerned, citing controlling authority by this Court. Hicks, 563 S.E.2d at 683-85 (Kinser and Lemons, JJ., dissenting) (citing *inter alia* Broadrick, 413 U.S. at 615).

Finally, assuming *arguendo* that the trespass-barment policy encroached upon protected speech, this Court has held in United States v. Kokinda, 497 U.S. 720 (1990), and other courts have agreed, that the government can adopt content-neutral restrictions on speech in a non-public forum so long as those limitations are reasonable. Under these cases, it was incumbent upon the majority below to determine whether the now-privatized streets and sidewalks of Whitcomb Court are public or non-public fora.[33] Absent this analysis, its finding of overbreadth is doctrinally unsound and, more importantly, squarely in conflict with relevant decisions by this Court and by other state and federal appellate courts.

The constitutional issues framed by the Petition and this brief *amicus curiae* have routinely attracted this Court's attention and compelled it to exercise jurisdiction to resolve

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[33] Because Hicks was "not engaged in [any First Amendment] speech or expressive association" at the time of his post-barment arrest, the dissent deemed it unnecessary to engage in a traditional forum analysis. Hicks, 563 S.E.2d at 684 (Kinser and Lemons, JJ., dissenting).

their inherent complexities. *See, e.g.*, Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Village of Stratton, 122 S. Ct. 2080 (2002) (striking down local ordinance prohibiting door-to-door canvassing on First Amendment grounds); Department of Housing and Urban Dev. v. Rucker, 122 S. Ct. 1230 (2002) (concluding that a public housing authority could hold tenants strictly liable for the drug-related criminal acts of their guests and seek an eviction on that basis to protect other residents). This case reflects the conflict between Rucker and Watchtower, where a housing authority's and City's law enforcement interests collide (in the view of a majority of the Supreme Court of Virginia) with the First Amendment rights to petition and freedom of speech. This Court should grant a writ to decide the clash between these weighty and important constitutional issues.

ARGUMENT

I. This Court should grant a writ to ensure that only those whose rights to speech are possibly silenced or chilled have standing to claim overbreadth.

The majority below ruled that Hicks "was entitled to challenge the validity of his conviction on the basis that the Housing Authority's practices and procedures contravened his constitutional rights." Hicks, 563 S.E.2d at 677. Rather than analyze the nature or quality of his conduct at the time of his arrest, it merely observed that decisions from both this Court and it have "permitted criminal defendants to assert constitutional challenges to various ordinances in criminal prosecutions." *Id.* (citing *inter alia* Lovell v. City of Griffin, 303 U.S. 444 (1938). This stripped-down view of standing is incorrect, setting a conflicting precedent on an important issue of federal law that should not be allowed to stand.

This Court has held that whenever a defendant's conduct "falls within the core of the regulation" at issue, he

"lacks standing to contend that the regulation is vague and overbroad." Haig v. Agee, 453 U.S. 280, 309 n.61 (1981) (citing Parker v. Levy, 417 U.S. 733, 755-56 (1974)). Lower federal courts, and state appellate courts, have followed this controlling principle, as they must. *See, e.g.*, Brecheisen v. Mondragon, 833 F.2d 238, 243 (10th Cir. 1987), *cert. denied*, 485 U.S. 1011 (1988) (concluding that "'a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court'") (quoting Broadrick, 413 U.S. at 610); Wells v. State, 351 N.E.2d 43, 47 (Ind. Ct. App. 1976) ("[W]here conduct rather than speech is involved and the appellant stands at the hard core of permissible regulation, his standing to assert facial overbreadth will not be recognized.") (citing Broadrick).

In Broadrick, three public servants challenged as vague and overbroad the portion of a state act that prohibited governmental employees from *inter alia* soliciting political contributions, running for paid public office, and engaging in other partisan activity. 413 U.S. at 602-06. Both arguments failed. First, this Court deemed the vagueness claim "all but frivolous" because the state statute was written "'in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with . . . .'" *Id.* at 607-08 (citation omitted). Second, the act was not overbroad because it regulated "political activity in an even-handed and neutral manner." *Id.* at 616. This Court stated that judicial concern over an allegedly overbroad standard "attenuates as the . . . behavior . . . moves from 'pure speech' toward conduct . . . that . . . – even if expressive – falls within the scope of otherwise valid criminal laws . . . ." *Id.* at 615. Notably, this Court further explained that although laws

> if too broadly worded, may deter protected speech to some unknown extent, there

> comes a point where that effect – at best a prediction – cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.

Id. (citation omitted).

Here, that "point" was reached and clearly exceeded. As noted *supra*, Hicks had been convicted on multiple occasions for trespassing in Whitcomb Court. He was ultimately barred from that community, and every other RRHA neighborhood. Moreover, the general district court judge who had first tried Hicks had ordered Hicks in open court not to return to RRHA property. Rather than heed these directives, Hicks proceeded to trespass again in Whitcomb Court. When he was stopped and questioned by a policeman who knew about Hicks' barment, he stated that he was delivering diapers, not engaging in speech.

Hick's conduct is clearly not subject to any First Amendment protection. RRHA's trespass-barment policy was designed to help eliminate crime and drug-related activity in public housing – an interest that motivated this Court last term in Rucker to hold that a public housing authority has "the discretion to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known of [such] activity." 122 S. Ct. at 1236.

Because the trespass-barment policy at issue was also intended to prevent outsiders like Hicks from trespassing in RRHA neighborhoods, which constitute private property, his conduct unequivocally fell within its scope of regulation, and his overbreadth challenge should have been disallowed *ab initio* for lack of standing.

II. This Court should grant a writ because there was no finding on the record below that any alleged overbreadth was real or substantial in light of the trespass-barment policy's legitimate sweep.

The majority below limited its review to the "narrow issue" of whether "a redevelopment and housing authority's trespass policy is overly broad . . . ." Hicks, 563 S.E.2d at 675. Although it acknowledged the direction from Broadrick that "the overbreadth doctrine is 'strong medicine,'" and that it "should be employed 'sparingly and only as a last resort,'" the majority bypassed Broadrick on its principally applicable point through its refusal to accept that the trespass-barment policy targets conduct, not speech. *Id.* at 678.

In Broadrick, this Court established the standard that "where conduct and not merely speech is involved . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Broadrick, 413 U.S. at 615. This standard has been cited as bedrock law by every federal circuit court of appeals. New England Accessories Trade Ass'n, Inc. v. City of Nashua, 679 F.2d 1, 5 (1st Cir. 1982); Gormley v. Director, Conn. State Dep't of Probation, 632 F.2d 938, 942 (2d Cir.), *cert. denied*, 449 U.S. 1023 (1980); Rode v. Dellarciprete, 845 F.2d 1195, 1200 (3d Cir. 1988); Thorne v. Bailey, 846 F.2d 241, 244 (4th Cir.), *cert. denied*, 488 U.S. 984 (1988); Baby Dolls Topless Saloons, Inc. v. City of Dallas, 295 F.3d 471, 482 (5th Cir. 2002); Staley v. Jones, 239 F.3d 769, 785 (6th Cir. 2001); Paulos v. Breier, 507 F.2d 1383, 1386 n.6 (7th Cir. 1974); Otten v. Schicker, 655 F.2d 142, 145 (8th Cir. 1981); Roulette v. City of Seattle, 97 F.3d 300, 305 (9th Cir. 1996); Dodger's Bar & Grill, Inc. v. Johnson County Bd. of County Supervisors, 32 F.3d 1436, 1442 (10th Cir. 1994); Horton v. City of St. Augustine, 272 F.3d 1318, 1332 (11th Cir. 2001); Hastings v. Judicial

Conference of the United States, 829 F.2d 91, 106 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1014 (1988).

This principle has similarly and routinely been cited by at least twenty-five state courts of last resort. *See, e.g.*, State v. Hookstra, 638 N.W.2d 829, 838 (Neb. 2002); Galloway v. State, 781 A.2d 851, 875 (Md. 2001), *cert. denied*, 122 S. Ct. 1547 (2002); State v. Cotton, 769 So. 2d 345, 356 (Fla. 2000); State v. Musser, 977 P.2d 131, 132-33 (Ariz. 1999); State v. Nye, 943 P.2d 96, 103 (Mont. 1997); Ino Ino, Inc. v. City of Believue, 937 P.2d 154, 172 (Wash. 1997), *cert. denied*, 522 U.S. 1077 (1998); United States v. Smith, 685 A.2d 380, 387 (D.C. 1996), *cert. denied*, 522 U.S. 856 (1997); State v. Brown, 648 So. 2d 872, 878 (La. 1995); Aguilar v. People, 886 P.2d 725, 727 (Colo. 1994); State v. Thiel, 515 N.W.2d 847, 853 (Wis.), *cert. denied*, 513 U.S. 878 (1994); State v. Todd, 468 N.W.2d 462, 466 (Iowa 1991); *In re* Appeal of Suspension of Huffer from Circleville High Sch., 546 N.E.2d 1308, 1313 (Ohio 1989); Cranston Teachers Alliance Local No. 1704 AFT v. Miele, 495 A.2d 233, 235 (R.I. 1985); Morrisette v. Dilworth, 452 N.E.2d 1222, 1224 (N.Y. 1983); People v. Holder, 451 N.E.2d 831, 834 (Ill. 1983); Spilotro v. State *ex rel.* Nev. Gaming Comm'n, 661 P.2d 467, 471 (Nev. 1983); Morris v. Municipal Court for the San Jose-Milpitas Judicial Dist. of Santa Clara County, 652 P.2d 51, 58 n.14 (Cal. 1982); Caby v. State, 287 S.E.2d 200, 202 (Ga. 1982); Woll v. Kelley, 297 N.W.2d 578, 593 (Mich. 1980); State v. Baysinger, 397 N.E.2d 580, 587 (Ind. 1979), *appeal dismissed sub nom.* Clark v. State, 446 U.S. 931 (1980); Gabriel v. Town of Old Orchard Beach, 390 A.2d 1065, 1068-69 (Me. 1978); Commonwealth v. DeFrancesco, 393 A.2d 321, 330 (Pa. 1978); *In re* Banks, 244 S.E.2d 386, 391 (N.C. 1978); State v. Woodworth, 234 N.W.2d 243, 250 (N.D. 1975); State *ex rel.* Gonzales v. Manzagol, 531 P.2d 1203, 1207 (N.M. 1975).

The inescapable fact that the trespass-barment policy is directed at conduct, not speech, is easily confirmed by the history behind its adoption. For example, it has been reported in a published decision that "RRHA tenants are the victims of an extraordinarily high incidence of crime, much of which is connected to illegal drug traffic." Richmond Tenants Org., Inc. v. Richmond Redevelopment and Housing Auth., 751 F. Supp. 1204, 1207 (E.D. Va. 1990), *aff'd*, 1991 U.S. App. LEXIS 27694 (4th Cir. Nov. 8, 1991) (*per curiam*) (allowing lease changes, including a ban on gun ownership, on RRHA premises). As noted *supra*, RRHA devised and executed the trespass-barment policy to increase public safety, and lower criminal activity by unwelcome outsiders and trespassers, in its communities. The clear and present danger created by the violent conditions in Whitcomb Court and elsewhere justifies implementation of the policy. *See, e.g.*, Khademi v. South Orange County Community College Dist., 194 F. Supp. 2d 1011, 1026 (C.D. Cal. 2002) ("The state has a compelling interest in the enforcement of its criminal laws.") (citing Branzburg v. Hayes, 408 U.S. 665, 700-01 (1972)); National Paint & Coatings Ass'n v. City of Chicago, 803 F. Supp. 135, 143-44 (N.D. Ill. 1992) (discussing exercise of a city's police power to deter illegal activity and preserve property values).

In contrast to the policy's "plainly legitimate sweep," Broadrick, 413 U.S. at 615, the record displays no "real" or "substantial" concern that speech is being silenced. Gloria Rogers testified that she had never denied permission to anyone wishing to distribute flyers in RRHA developments. Hicks was not arrested for engaging in protected speech, but for trespassing post-barment in Whitcomb Court. During his criminal proceedings, Hicks offered no witnesses to establish that anyone had refused to come into Whitcomb Court for

fear of arrest or prosecution[34] under the policy. Simply stated, there was a complete failure by Hicks to offer evidence that the policy was chilling or prohibiting any protected, or arguably protected, speech.

"The premise that a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications is hardly novel." New York v. Ferber, 458 U.S. 747, 771 (1982). Because this is indeed "the paradigmatic case of a [policy] whose legitimate reach dwarfs its arguably impermissible applications," the Petition for Appeal should be granted to correct the error below. *Id.* at 773.

III. This Court should grant a writ to decide whether privatized sidewalks and streets owned by a local housing authority constitute a non-public forum.

In its panel and *en banc* decisions below, the Court of Appeals of Virginia debated at length whether the privatized streets and sidewalks in Whitcomb Court are public or non-public fora under decisions by this Court. *Compare* Hicks v. Commonwealth, 535 S.E.2d 678, 683-84 (Va. Ct. App. 2000) (non-public fora), *with id.* at 685-88 (Coleman, J., concurring in part and dissenting in part) (public fora); Hicks v. Commonwealth, 548 S.E.2d 249, 253-55 (Va. Ct. App. 2001) (*en banc*) (non-public fora), *with id.* at 259-61 (Humphreys, Willis, Bray, Bumgardner, and Agee, JJ., dissenting) (public fora).

But the debate at the Supreme Court of Virginia was decidedly one-sided. While none of the justices conducted a forum analysis, the dissent **and even Hicks** recognized that

[34] Gloria Rogers testified that nobody is arrested until after being warned not to trespass on RRHA property. Her testimony was uncontested, and Hicks was admittedly warned before being barred and later arrested.

the Kokinda framework – *i.e.*, that "'the extent to which the Government can control access depends on the nature of the relevant forum'"[35] – controlled. Hicks, 563 S.E.2d at 684-85 (Kinser and Lemons, JJ., dissenting) ("The defendant agrees that this analytical framework applies in this case . . . .") (quotation at 684). Given this consensus, the majority's decision to sidestep this question and to strike down the trespass-barment policy based upon Gloria Rogers' allegedly "unfettered discretion [as] a government official" warrants further review by this Court. *Id.* at 681.

An excerpt from Rogers' testimony is included in the majority decision below. *Id.* at 680-81. But the testimony that immediately followed that colloquy was omitted.

> Q: Are there any particular guidelines . . . that you refer to determine whether or not any group or type of religion will be allowed to circulate [flyers or other materials]?
>
> A: Yes. I refer all those to community council and they meet with the board and the residents to decide, because there's so many residents and so many things, the City Council and housing management work out . . . .

Even in situations where Rogers was shown a church flyer, which she was used to seeing, she would often refer it to her immediate supervisor for approval.

It is apparent that RRHA installed a series of checks and balances to prevent content-based restrictions on speech from occurring. While these safeguards could arguably have been stronger, the constitutionality of the trespass-barment policy turns not upon the strength of these checks, but upon

[35] Kokinda, 497 U.S. at 726 (citation omitted).

their existence. Such policies have been held constitutional by several federal courts of appeals and state courts of last resort. (Pet. for Appeal at 22-25.) The conflict in authority generated by the majority decision below, coupled with the fact that this Court has not yet resolved this important issue of federal law, warrants the issuance of a writ here.

CONCLUSION

This Court "[f]or over 50 years . . . has invalidated restrictions on door-to-door canvassing and pamphleteering." Watchtower, 122 S. Ct. at 2086. But this Court also held 8-0 in Rucker that "local housing authorities . . . are in the best position to take account of . . . the degree to which the housing project suffers from 'rampant drug-related or violent crime," and to implement "'reasonable steps to prevent or mitigate the offending action.'" 122 S. Ct. at 1235 (citations omitted). This case amply demonstrates the conflict between these two holdings, and, as the Commonwealth describes it in its Petition, between government as sovereign and government as landlord. Whether the Watchtower rationale or the Rucker logic prevails is a decision that only this Court can properly (and finally) make.

RRHA's trespass-barment policy helped reduce crime in Whitcomb Court. It is a front-line policy in the war against drugs that is run by dedicated laypersons, not constitutional scholars. If a writ is not issued, and the Supreme Court of Virginia's decision is allowed to stand, many good works that have been accomplished in that neighborhood in the past four years will have been for naught. As crime levels again begin to increase,[36] this should not be allowed to occur.

---

[36] *See* Michael Hardy, Crime Rate Up 2.3 Percent in VA; Reported Rise Reverses Decade of Steady Drops, Richmond Times-Dispatch, July 12, 2002, at B2.

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No. 02-371

Supreme Court, U.S.
FILED
MAR 7 2003
OFFICE OF THE CLERK

In The
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

KEVIN LAMONT HICKS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Virginia

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Certiorari Granted January 24, 2003

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RELEVANT DOCKET ENTRIES

COMMONWEALTH v. KEVIN LAMONT HICKS

In the Circuit Court for the City of Richmond:

April 21, 1999	Virginia Uniform Summons [showing charge of trespass in violation of Va. Code § 18.2-119 and conviction by Richmond General District Court]
April 21, 1999	Notice of Appeal [to Richmond Circuit Court]
July 12, 1999	Motion to Dismiss
July 29, 1999	Trial Order [showing conviction by Richmond Circuit Court]
July 29, 1999	Sentencing Order
August 5, 1999	Notice of Appeal [to Court of Appeals]
August 19, 1999	Notice of Filing [transcripts]

In the Court of Appeals of Virginia:

August 13, 1999	Notice of Appeal
December 1, 1999	Petition for Appeal
March 6, 2000	Order [granting petition for appeal]
October 17, 2000	Order and Opinion of Court [affirming trial court]
October 26, 2000	Petition for Rehearing En Banc
December 5, 2000	Order [granting rehearing en banc]
July 3, 2001	Order and Opinion of Court [withdrawing panel opinion and reversing trial court]
July 11, 2001	Notice of Appeal to the Supreme Court of Virginia

In the Supreme Court of Virginia:

August 1, 2001	Petition for Writ of Appeal
October 26, 2001	Order [granting writ of appeal]
June 7, 2002	Opinion, Supreme Court of Virginia

BEST AVAILABLE COPY

ATTORNEYS PRESENT:

☐ PROSECUTING ATTORNEY (NAME)

Stephen Benjamin

☐ DEFENDANT'S ATTORNEY (NAME)

☐ NO ATTORNEY
☐ ATTORNEY WAIVED

THE ACCUSED WAS THIS DAY:

☐ TRIED IN ABSENCE
☐ PRESENT

THE ACCUSED PLEADED:

☑ NOT GUILTY
☐ NOLO CONTENDERE
☐ GUILTY ☐ PREPAYMENT

AND WAS TRIED AND FOUND BY ME:

☐ FINDING SUFFICIENT DEFERRED $ _____
☐ NOT GUILTY
☐ GUILTY AS CHARGED
☐ GUILTY OF _____

IN ADDITION I FIND THE ACCUSED WAS:

☐ DRIVING A COMMERCIAL MOTOR VEHICLE
☐ CARRYING HAZARDOUS MATERIALS

☐ I ORDER THE CHARGE DISMISSED

☐ I ORDER A NOLLE PROSEQUI ON COMMONWEALTH'S MOTION

I IMPOSE THE FOLLOWING SENTENCE:

☐ FINE ☐ CIVIL PENALTY OF $ _____ WITH $ _____ SUSPENDED.

☐ DRIVER'S LICENSE SUSPENDED EFFECTIVE IN TEN (10) DAYS IF FINES/COSTS NOT PAID IN TEN (10) DAYS. § 46.2-395.

☐ JAIL SENTENCE OF _____ WITH _____ SUSPENDED CONDITIONED UPON BEING OF GOOD BEHAVIOR AND KEEPING THE PEACE.

☐ ON PROBATION FOR _____

☐ DRIVER'S LICENSE SUSPENDED _____

☐ RESTITUTION OF _____ PAYABLE TO _____ BY _____ AS CONDITION OF SUSPENDED SENTENCE.

☐ OTHER _____

4/21/99 — DATE — JUDGE

APPEAL BOND $ _____ ☐ APPEAL NOTED ON _____ ☐ APPEAL WITHDRAWN _____

731208

VIRGINIA UNIFORM SUMMONS

RICHMOND POLICE DEPARTMENT, RICHMOND, VA. 1606TNN

CASE NO. 99000859 R

YOU ARE SUMMONED TO APPEAR IN THE (CITY OF / COUNTY OF)

CITY OF RICHMOND

☐ GENERAL DISTRICT COURT (TRAFFIC)
( ) 400 N. NINTH STREET
( ) 905 DECATUR STREET

☒ GENERAL DISTRICT COURT (CRIMINAL)
(X) 501 N. NINTH STREET
( ) 905 DECATUR STREET

☐ JUVENILE & DOMESTIC RELATIONS DISTRICT COURT
( ) 1600 N. SEVENTEENTH STREET

ON Feb 1, 1999 AT 9:30 ☒ A.M. ☐ P.M.

FOR VIOLATION OF ☐ STATE ☐ COUNTY ☒ CITY ☐ TOWN

LAW SECTION 18.2-119 DESCRIBE CHARGE:

Trespass on RCHA Property

☐ COMMERCIAL MOTOR VEHICLE ☐ HAZARDOUS MATERIALS

I PROMISE TO APPEAR AT THE TIME AND PLACE SHOWN ABOVE. SIGNING THIS SUMMONS IS NOT AN ADMISSION OF GUILT. I CERTIFY THAT MY CURRENT MAILING ADDRESS IS AS SHOWN BELOW.

Kevin Hicks
SIGNATURE

YOU MUST APPEAR AT TRIAL (JUVENILES MUST APPEAR WITH PARENT/ LEGAL GUARDIAN).

☐ YOU MAY AVOID COMING TO COURT ONLY IF THIS BLOCK IS CHECKED AND ALL INSTRUCTIONS ON **DEFENDANT'S COPY** ARE FOLLOWED.

ONLY CALL _____ IF MORE HELP IS NEEDED.

MAILING ADDRESS: ☐ SAME AS ABOVE AT RIGHT ☐ CHANGE FROM D. L.

P. O. BOX/STREET 22679 CITY/TOWN none STATE 3-19-99 ZIP 2344

NAME: LAST	FIRST	MIDDLE
Hicks	Kevin	Lamont

RES. ADDRESS: 3444 South Gate # A — RES. JURIS.

CITY/TOWN: Richmond — STATE: VA — ZIP

RACE	SEX	D.O.B. MO.	D.O.B. DAY	D.O.B. YR.	HT. FT.	HT. IN.	WGT.	EYES	HAIR
B	M	1	21	76	5	8	150	Brn	Brn

DL / CDL # (IF CRIMINAL OFFENSE OR NO LICENSE, USE SSN): 227-29-3730 — STATE: VA

VEH	YEAR	MAKE	TYPE	LICENSE NO.	YEAR	STATE

JURISDICTION OF OFFENSE	DATE OF OFFENSE	DAY OF WEEK	TIME
120	01/20/99	Wed	8:52 A.M. / P.M.

DIRECTION	ACCIDENT YES / NO	WEATHER	ROUTE NUMBER / STREET

LOCATION OF OFFENSE: 2348 Bethel St.

ARREST DATE	ARREST LOCATION
01/20/99	2348 Bethel St

OFFICER	CODE / BADGE NO.
James Laino C	2066

HEARING DATE AND TIME

2/19/99
2/26/99
3/12/99
4/21

110/201 FINE
114/129/237 CIVIL PENALTY
112
140 PROCESSING FEE
148
229 CHMF
124 TA FEE
132 CICF
120/217 CI. ATTY.
113 WITNESS FEE 10.00
TOTAL $

109 INTEREST CHARGE
TOTAL WITH INTEREST $

DATE PAID _____ RECEIPT NO. _____

ON THE DEFENDANT'S CASE WAS CALLED IN OPEN COURT AND THE DEFENDANT DID NOT RESPOND OR APPEAR. DAY OF Feb 26 1999 AT 5:46 AM/PM.

JUDGE

not return for R Hicks

COURT COPY-PG. 1

VUS REV. 7-1-93

VIRGINIA:

IN THE CIRCUIT COURT OF THE
CITY OF RICHMOND
John Marshall Courts Building

COMMONWEALTH OF VIRGINIA

v.

KEVIN LAMONT HICKS

MOTION TO DISMISS

(Filed July 12, 1999)

The defendant, by counsel, moves this Honorable Court to dismiss the prosecution of all matters before this court, including charges of trespass and orders concerning the revocation of suspended sentences for conviction and instances of trespass. In support of this motion, the defendant states as follows:

1. In 1997, the City of Richmond, the Richmond Police Department, and the Richmond Redevelopment and Housing Authority (RRHA), a political subdivision of the Commonwealth of Virginia, developed a law enforcement strategy and trespass policy for use in various public housing communities.

2. The strategy was to take steps which would have the effect of broadening the scope and effect of the Virginia criminal trespassing statute (Va. Code §18.2-119) to deter and criminalize lawful conduct not otherwise reached by the statute.

3. A purpose of this strategy (which is referred to in this motion as "the trespass policy"), was to discourage the presence of guests in these communities.

4. Another purpose of this strategy was to regulate, deter, and criminalize the presence in the communities of a class of persons loosely defined as "unauthorized."

5. These purposes are achieved by permitting and causing the Richmond Police to detain, interrogate, and search any people within the community suspected of being nonresidents or "unauthorized."

6. These purposes are further achieved by threatening prosecution of all unauthorized people present in the community.

7. These purposes are further achieved by threatening eviction and loss of public housing for residents permitting or assisting the presence of unauthorized guests.

8. Part of the trespass policy involves the banning of people from the community for undefined reasons, and the prosecution of these people upon their reentry, for any reason, into the community. As part of the policy, once a person is banned from the community, that ban is permanent and irrevocable.

9. In order to accomplish these goals, and in furtherance of other ends of the strategy, the City passed ordinances closing designated streets within public housing communities and deeded by quitclaim its rights in the closed portions to RRHA.

10. The purpose for closing the streets was to enable the City to characterize an entire housing community as private property. Once accomplished, the City's strategy was to use the Richmond Police Department to enforce the trespassing statute to deter the association and presence of people in the community not conducting legitimate business or who were not otherwise "authorized" to be present. Although the

housing communities have been characterized as private property, this labeling is a pretext; the public housing communities are in fact public property in all essential respects.

11. Towards accomplishing the intended deterrent effect, the City and RRHA publishes and distributes pamphlets describing the program.

12. These pamphlets warn that "selected streets" are RRHA property, and that "unauthorized persons" will be considered trespassers and will be prosecuted. "Unauthorized persons" are described as "any person who had been barred by RRHA from the development, or cannot demonstrate that they are on the development visiting a lawfully residing resident, or on the development conducting legitimate business."

13. The trespass policy developed and enforced by the parties, including the closing of the public streets and sidewalks, violate the First and Fourteenth Amendments to the United States Constitution and Article I, §12 of the Constitution of Virginia, by depriving the residents, their family, friends, and guests, of their fundamental rights to freedom of association, speech, and assembly, and by unconstitutionally suspending the First Amendment from applicability in these communities in violation of the Fourteenth Amendment and Article I, §7 of the Constitution of Virginia.

14. The trespass policy developed and enforced by the parties, including the closing of the public streets and sidewalks, violates the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment to the United States Constitution by depriving residents of public housing and their guests of basic liberty interests and privacy without due process of law and for no legitimate or rational purpose.

15. The trespass policy developed and enforced by the parties, including the closing of the public streets and sidewalks, authorize, cause, and encourage the warrantless detention of persons in these communities without reasonable suspicion or probable cause to believe that any crime has been committed, and for the mere exercise of their constitutional rights to freedom of association, travel, and assembly in violation of the First, Fourth, and Fourteenth Amendments to the United States Constitution.

16. The trespass policy developed and enforced by the parties, including the closing of the public streets and sidewalks, invests unbridled and unreviewable discretion in the police and RRHA, is unconstitutionally vague and overbroad, and permits and encourages arbitrary and capricious enforcement by the police, RRHA, and the City of Richmond.

17. The alleged banning of Kevin Hicks from public housing projects, his detention and interrogation by the police, and his arrests and convictions for trespassing, were the product of the unconstitutional trespassing policy and enforcement of Va. Code §18.2-119 described in this motion. For each and all of the reasons alleged herein, the matters pending before this court should be dismissed.

KEVIN LAMONT HICKS

By /s/ S.D.B.
Counsel

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VIRGINIA:

IN THE CIRCUIT COURT OF THE
CITY OF RICHMOND

JOHN MARSHALL COURTS BUILDING

COMMONWEALTH OF VIRGINIA,	
Vs.	(Filed Aug. 19, 1999)
KEVIN L. HICKS,	
defendant	

Complete transcript of the testimony and other matters, in the above motion, when heard on June 15, 1999, before the Honorable Thomas N. Nance, Judge.

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* * *

[13] MR. BENJAMIN: Well, I think we still have some other matters to resolve before we get to the trial, if the Court please.

THE COURT: All right.

MR. BENJAMIN: We filed a motion, a request for the issuance of a subpoena duces tecum. The Commonwealth Attorney has moved to quash that. I think she would like to be heard on that.

THE COURT: What are you seeking, Mr. Benjamin?

MR. BENJAMIN: By written motion, we had set out the documents that we are seeking. That should be in the file. I don't know if you have it before you or not.

THE COURT: To Gloria Rogers?

MR. BENJAMIN: That's correct.

THE COURT: Who is she?

MR. BENJAMIN: She is present, Your Honor. I'd ask her to state her title for the record.

MS. ROGERS: I'm Housing Manager of the Housing Authority.

* * *

[14] MS. PARRISH: Judge, part of my basis for the Motion to Quash was that none of the addresses listed in Mr. Benjamin's [15] request were the address on which Mr. Hicks was actually arrested.

He was arrested at 2348 Bethel Street and the subpoena duces tecum requested leases for 2414 Carmine Street Virginia Hicks or 2428 Carmine Street and for 2369 Bethel Street. I don't know how they relate to this case.

MR. BENJAMIN: If we could excuse Ms. Nash? She may be called as a witness. If we could just ask her to step out in the Hall – Ms. Rogers. I'm sorry

(Ms. Rogers steps into the hall.)

MR. BENJAMIN: Your Honor, if the Court please, and there are only three leases sought, because it's my information that Virginia Hicks in fact resides at 2414 Carmine Street. I just wanted to double check that.

Virginia Hicks is Kevin Hicks' mother. She lives in Whitcomb Court. 2448 Carmine Street is the apartment leased to Pamela Brown who is Virginia Hicks' sister. [16] Kevin's aunt. And 2369 Bethel Street is the apartment leased by Maria Pryor, who is present, who is the mother of Kevin Hicks' child.

We would be seeking this as part of our defense that Kevin Hicks had a good faith belief in his right to be present on this property.

THE COURT: If the Commonwealth stipulates that they are leased to these folks, why do you need to –

MR. BENJAMIN: First, they haven't so stipulated. And secondly, it is usually the shoe is on the other foot and the Commonwealth insists that they don't have to be required to accept the stipulation. Then I would not want to. I would want to be in the position to prove with an actual physical lease that these people have a

lease-hold interest in this property and it is at the particular addresses.

I can say much more, but I won't be as long-winded as I usually am.

THE COURT: All right.

MR. BENJAMIN: With respect to [17] Request Number, I don't think there is any contest as to the materiality there.

What we are trying to demonstrate is that, and I tell you quite frankly, it is unclear to me whether, I think Kevin Hicks has been banned from that property, but I cannot define for the life of me why he has been banned from that property.

So any documents, any reports, I know that the project has been in the process of compiling, if they haven't already, a list of individuals who are banned. I think up to know [sic] it has all been in Ms. Rogers' head, I think.

But I think at this point, I believe that there is a document listing the individuals who have been banned.

I need to determine from these documents, I need to show from these documents that this individual has in fact been banned and that it has been for non-criminal activities, other than the prosecution of these trespassing laws.

* * *

[21] THE COURT: All right.

MR. BENJAMIN: And it's not just, as somebody recently accused me of some sort of, I forget the word, crusade. It's a practical problem, because Mr. Hicks, in particular, I don't think has ever been arrested for any criminal activity out there, selling drugs.

THE COURT: He has been arrested two or three times for trespass out there.

MR. BENJAMIN: That's it. It has all been trespassing. In each time it has been his effort, as I understand it, to go visit someone you would want to visit.

THE COURT: After being arrested and prosecuted –

MR. BENJAMIN: Absolutely. And he has built up all this suspended time.

The problem is, I don't know how in the world you can reasonably say to somebody, you can't go see your mom. So he continues to do that, despite my best advise that he is just making it worse because he wants to see his mom and his child. It is a practical matter.

[22] THE COURT: You might have just made yourself a witness.

MR. BENJAMIN: Well, no, because this is argument and not representation. I don't mean it as representation.

THE COURT: Oh.

MR. BENJAMIN: I'm just telling you that this is a problem that doesn't amount to a defense. It is not just a crusade.

THE COURT: Does your client have these things?

MR. JOHNSON BLANK: Judge, if I may, 18.2-119 is the trespass statute, and I think, Judge, you hit right on it. The trespass statute says that a landowner can ban anybody they want for whatever reason they want at anytime that they want to. And the Housing Authority objects to them having to produce documents in this case because they're irrelevant beyond the criminal statute.

If they banned him and there is a notification, I think if the defendant wants the form that says that you were [23] banned, we have the original of that and the original was hand-delivered to him in Court. I think that is part of the Commonwealth's case.

I'm not trying to step in, but insofar as the other documents, Judge, the Housing Authority would object to producing any of them because we don't think that they are relevant to this case and what it would tanenmount be doing is put the Housing Authority on trial.

THE COURT: Do you have any written guidelines or policies, statements or documents concerning who is to be banned and who is not?

MR. JOHNSON BLANK: There is a document, Judge, when someone is banned that –

THE COURT: I know, but do you have anything that says how they determine who is going to be banned?

MR. JOHNSON BLANK: No, sir. Not that I am aware of, Judge.

THE COURT: I know that I had one of these cases before and the procedures we [24] [sic] along the same lines. And what they did was finally indicated on the banning was the reason was the selling of drugs and hanging out with drug dealers which was relevant in the case.

Anyway, I want you to give a copy of the leases on 2414, 2428, 2369.

* * *

THE COURT: What else do you need, Mr. Benjamin?

MR. BENJAMIN: Any documents that [25] concern this particular defendant, Kevin Hicks.

THE COURT: Yeah. I just said that he's going to give you a copy of the one delivered to him in Court.

MR. BENJAMIN: I take it then that RRHA is representing that they have no documents that fall within Request Number 3, all written guidelines, policies, statements and documents concerning the enforcement of trespassing laws.

MR. JOHNSON BLANK: Judge, it's my understanding that those documents, there are no documents. I can double check on that.

THE COURT: All right. If you have them, deliver them.

* * *

VIRGINIA:

IN THE CIRCUIT COURT OF THE
CITY OF RICHMOND

JOHN MARSHALL COURTS BUILDING

COMMONWEALTH OF VIRGINIA	
vs	(Filed Aug. 19, 1999)
KEVIN LAMONT HICKS	

Complete transcript of testimony and other incidents in the above, when heard on July 13, 1999, before the Honorable Thomas N. Nance, Judge.

CRANE-SNEAD & ASSOCIATES, INC.
4914 Fitzhugh Avenue, Suite 203
Richmond, Virginia 23230
(804) 355-4335

* * *

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* * *

[13] WHEREUPON,

GLORIA STOKES ROGERS,

called by the Defendant, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BENJAMIN:

Q Would you state your name, please.

A Gloria Stokes Rogers.

Q And your occupation.

A Housing manager with Richmond Housing Authority.

Q You've been at that position approximately how long, Ms. Rogers?

A Housing manager, five years. With the Housing Authority, 23 years.

Q I'm handing you a document.

(Document proffered to the witness.)

Are you familar with the document you've been handed?

A Yes, I am.

[14] Q Is this a document prepared and distributed by Richmond Redevelopment Housing Authority?

A Yes, it was.

Q Does is [sic] it describe the street privatization and trespass policy in affect [sic] in the R.R.H.A. Properties?

A This is a copy of a flyer that was sent out to residents when we privatized our streets. Prior to having our streets privatized we wanted to be – council – we had a meeting of record and this flyer was passed out to the residents. At the meeting I explained to them what privatization was all about. This is not the policy. This is a brochure to explain about privatization of our streets, but it's not our policy.

Q Do you have any other written policy?

A Any other written policy?

Q Concerning street privatization or the trespass policy or the enforcement of trespass laws in the R.R.H.A. properties.

[15] A That was handle [sic] through City Council in an ordinance that spoke to some of that.

Q Uh-huh.

A But I don't have that policy per se. There is an order through council – the council handled – got permission to have our streets privatized.

Q You know of no written guidelines or policies concerning the enforcement of trespassing laws in the

public housing project other than the City ordinances; is that correct?

A I have a document here that gives – signed by Mr. Purdy, that gives policemen permission to enforce no trespassing on privatization streets.

Q May I see that, please?

A Yes.

(Document proffered to counsel.)

(Witness continues to peruse documents.)

[16] Q Let me – Are you still looking?

A And this is a copy of the policy for the City Council.

(Document proffered to counsel.)

(Counsel peruses document.)

Q You have handed me one document titled Deed, made this 25th day of July 1997, between the City of Richmond and R.R.H.A. That's one of the documents?

A That's correct.

MR. BENJAMIN: Your Honor, I'll introduce this as Defense Exhibit 1, the Deed.

(Defendant's Exhibit No. 1 entered into evidence.)

BY MR. BENJAMIN:

Q You have also handed me a [17] document captioned Authorization, which was signed on the 13th day of November, 1998.

A You have my originals so [sic].

Q I know.

MR. BENJAMIN: May I approach the bench?

BY MR. BENJAMIN:

Q Is that one of the documents you were –

A Yeah. This is the one by Tyrone Curtis authorizing the police department to enforce trespassing policy on our development.

MR. BENJAMIN: Your Honor, Defense Exhibit No. 2, please.

MS. REINER: No Objection, Judge.

(Defendant's Exhibit No. 2 entered into evidence.)

BY MR. BENJAMIN:

Q You've also handed me a 13 page document. The first page which is just a [18] fax transmission sheet. The second page of which is June 25, '97 letter to Tyrone Curtis; is that correct?

A Uh-huh.

MR. BENJAMIN: Defense No. 3, please.

(Defendant's Exhibit No. 3 entered into evidence.)

BY MR. BENJAMIN:

Q Beside those three documents, collectively introduced as Defendant's 1 through 3, are there any other written policies or guidelines concerning the enforcement –

MS. REINER: Before Mr. Benjamin goes on, I was just handed a 20 page document to review that I've never seen. If he could hold off, so I can review it?

MR. BENJAMIN: Sure.

(Pause in the proceedings.)

[19] BY MR. BENJAMIN:

Q Apart from the documents contained in Defense 1 through 3, are there any other written policies or guidelines describing or governing the enforcement of the trespass laws in public housing communities?

A I'm not sure. Not that I'm aware of.

Q You're not aware of any? Do you still have that document I handed you, the pamphlet?

A Correct.

Q Turn to page one of that.

A Page one?

Q Yes, ma'am. I see there that it says among other things, selected streets are now R.R.H.A. property; is that correct?

A Correct. That's what it says.

Q Now, this was – the streets were privatized, if you will, in mid 1997?

A The date's on that letter.

Q All right. These [20] pamphlets, are they still being distributed? Do you still have them in your office?

Let me ask this question: Do you still have pamphlets like these or flyers in your office?

A I have a copy of the pamphlet in our office, yeah.

Q If a resident or anybody has a question about street privatization or the trespass policy, can they receive one of these?

A I assume so.

Q Do you have some to give out or would you make copies if someone asked?

A I would like to know what they'd it want [sic] for. I'd question them first. This is not a document itself. This was used to answer some questions – when we privatized our streets, there was [sic] some questions by residents about what privatization of the streets would mean.

Q Okay.

A Would it, you know, mean we couldn't park here – This is not all inclusive. So the [sic] depending on the reason they would ask for it, would determine whether [21] I'd give it to them to answer their questions or not.

THE COURT: That was just to give them a chance to object to the privatization of the streets?

THE WITNESS: Yes. A lot of people were scared, but they were scared – could not come on their property. They were scared, you know, if their children were out how it would affect them.

Q Right.

THE WITNESS: And this pamphlet was only to let them know what it was what [sic] they're asking for,

for their safety, for their well-being. This is not an all-in-one inclusive policy. This is not sketched – not rules and regulations, just a general idea of what trespassing may or may not encompass.

THE COURT: Is there anything in there when they lease property now, that their [sic] notified of this situation, that it's private property and the trespass will be enforced?

THE WITNESS: When [22] they're at the office, I always tell them what – and we have a lease-read before they sign that lease. I explain to them in detail, Your Honor.

THE COURT: What's in that pamphlet?

THE WITNESS: Basically, what's in the pamphlet, that it's not – you know, if a person is on the property and they're there for the right reasons, they haven't been barred, there are no problems. That church members can come, family can come on the property. That is no problem.

A trespasser is a person that's been barred from the property, and there are certain reasons they have been barred and the trespass comes into enforcement at that time.

THE COURT: Is it the policy over there to notify the people that you don't want, before they're ever arrested?

THE WITNESS: Correct, Your Honor. Basically, the police department would notify them, I mean with some – and we send out mail to them and let them know. But, [23] basically, the police department are the ones that see them and give them the notice and give them the warning before it's known.

I know of no circumstances where the person was – the first time they were on the property and nothing illegal was going on, where they banned them. Police officers warn them first, and then if they continue to be on the property that's when they're barred.

THE COURT: Then they're barred or arrested?

THE WITNESS: Depending on what's what. If there's criminal activity going on, they can be arrested. If they – sometimes they bar them, sometimes they're arrested. I'm not sure of, you know, the police enforcement policy, so I don't want to comment on –

THE COURT: But they're warned before they're ever arrested?

THE WITNESS: Everyone is warned first, Your Honor. I can definitely say that.

THE COURT: And in this particular case, was this man warned that you [24] know of, not the police department?

THE WITNESS: Your Honor, I talked to Kevin Hicks in my office on more than one occasion. When we left Circuit Court, Officer Jones – I was in his presence, I filled out the papers and we handed them to Kevin Hicks in this hallway on April of 1998. I wrote the form out. It was my handwriting on the form, and Officer Jones delivered it do [sic] him in person.

So, yes, Your Honor, he was warned by myself, by the police department, and also in writing.

THE COURT: Okay. Go ahead, Mr. Benjamin.

BY MR. BENJAMIN:

Q The first contact that you or the police have with an individual who is a nonresident, that is when they receive the waning [sic] that you're describing?

A Yes.

Q And if they're not lawfully present – they're not present for the right reasons at the time of that first warning, are [25] they then banned?

A Again you're asking me questions how the police do their job. And I don't want them to say – I'm not sure. I can tell you basically, they will let them know what the policy is. They will let them know what's what and give them a warning.

MS. REINER: Judge, I think I need to object. She can't testify as to what happened with this specific individual in this case. She can only testify as to her interaction with the defendant. And I think that Mr. Benjamin needs to bring forward evidence as to what specifically happened with his client, in order to establish his standing to make an objection.

MR. BENJAMIN: No, sir. Actually, the First Amendment challenges – that's the one time when an individual can assert challenges vicariously. And this is a First Amendment exception. The case is Perkins versus Commonwealth, from the Richmond Circuit Court.

THE COURT: Sustained.

MS. REINER: Thank you.

[26] MR. BENJAMIN: Is it your position that I cannot ask questions –

THE COURT: You have to put on evidence pertaining to this case.

MR. BENJAMIN: Only to this case?

THE COURT: In the case, when – the way you filed your papers and the way I understand the challenge to be, can include general provisions. And that's fine, as long as she knows.

MR. BENJAMIN: Sure. The general policy.

THE COURT: And she just got through telling you what she knows, and she's told you, "I can't tell you what the police do."

MR. BENJAMIN: Sure. I just didn't want to cut her off.

THE COURT: All right.

MR. BENJAMIN: That's all. I didn't want to interrupt her while she was answering. I just wanted to certainly firm up the question.

[27] BY MR. BENJAMIN:

Q Who gets banned?

A Who –

Q What's the policy about banning?

A Basically, if a person is on our property with drugs or if our streets are privatized – Can I give you a little more history on –

THE COURT: I'd rather you not.

THE WITNESS: I mean, I don't know. If the lease – If you're on the property –

BY MR. BENJAMIN:

Q Let me try to focus you.

A Thank you.

Q Let's say that the police see somebody on the property who's not a resident, and they're not in the company of someone who is a resident.

A Okay.

Q What is the policy about that person?

[28] A Have they been barred? If they've been barred already –

Q The first time that they are there.

A The first time that they are there on the property, the police will ask them, you know, Are you a tenant here? Do you live here?

I'm not sure of their line of questioning. If they said they are a resident, they would come and confirm with the main office whether they are a tenant or not in that development.

Q Let me sop [sic] you there. If the person says to the police that they are a tenant, then at that point they and the police officer go to, I guess, your office or the housing manager's office to confirm whether or not they're a tenant?

A Correct.

Q What if they say they are not – well, stick with that. What if it turns out they're not a tenant?

A At that point, the officer knows that the person is no longer a tenant, [29] then the next time they see them – they would inform them of the policy and let them know, you know, what the policy is on trespass.

Q What if the police encounter someone who says, No, I'm not a tenant, you know, I thought this was public property or something like that?

A Again, I have to assume –

MS. REINER: Your Honor, I object.

MR. BENJAMIN: In this hypothetical.

THE COURT: No. Sustained.

BY MR. BENJAMIN:

Q All right. Tell us, if you would, what the policy is for how you treat someone who is a nonresident.

Or let me ask the question in this way: How does someone become banned for purposes of enforcing the trespass policy?

A When the police observe them, not with a tenant on the property and they cut through different areas and they [30] let them know the policy, as far as being a tenant or what have you, and they continue to be on the property, if they're charged with drugs or anything of that nature on our property, they are a harm to the neighborhood, then they're barred.

Q And it's any one of those reasons; is that right?

A Any one of those reasons. I also offered domestic violence.

Q And that's your own policy?

A I want to say it's not my own policy. The lease says –

MS. REINER: Your Honor, I object again.

THE COURT: Overruled. Go ahead.

BY MR. BENJAMIN:

Q Go ahead.

A The safety of the development and when a person presents a threat to the safety of the neighborhood, and if there's proof there or there's a liability there, then I say that's reason to be barred [31] from the property. They've been a threat to the neighborhood or, you know, the property or the people living there.

Q I guess I –

A And domestic violence does not necessarily fall under those rules.

Q And you have in your job, in your position, the right as you see it to make determinations like this? In other words, the housing manager for Creighton Court might not bar for domestic violence?

A You're asking me to assume something.

Q No. No. I'm just telling you – this is your own policy, it's been across the board or an H.H. [R.R.H.A.] policy, is it?

A I'm going to say it's R.H.H. [R.R.H.A.] policy, because HUD did say to us – we have rules for HUD and the – (Inaudible) – Act to react for the safety of the neighborhood and the safety of the residents. So I'm going to say according to HUD and landlord/tenant that is a right for all public housing managers.

Q Okay. On page one of this [32] document that you sent out, it describes unauthorized persons. Do you see that?

A Uh-huh.

Q And it describes unauthorized persons as first, being any person who has been banned. Do you see that?

A Uh-huh.

Q And that's still the case; is that correct? Someone who has been banned is unauthorized?

A Correct.

Q And it also describes unauthorized persons as any person who cannot demonstrate that they are visiting a lawfully residing resident or conducting legitimate business. Do you see that?

A Okay.

Q Do you see that there?

A I see that here.

Q Is that still accurate? Is that still part of the policy, as to who is an unauthorized person?

A Again, I'm going to say I assume – I assume – if a policeman stops you and you cannot prove to them that

you're [33] conducting legal business, you cannot prove that you are seeing a resident, and if you've been barred then – I'm not sure of your question.

Q Here's the question: if the policeman stopped you, is it your policy that when the police sees someone who cannot demonstrate that they are either visiting a lawful residing resident or conducting legitimate business, that that person is an unauthorized person?

A I would say so. Yes.

Q And an unauthorized person is someone who will be prosecuted for trespassing, according to R.R.H.A. policy.

THE COURT: That's not what she said, Mr. Benjamin. She said these people will be at that time formally barred and told that they should not come back, and if they do then they're arrested; is that correct?

THE WITNESS: You're right, Your Honor.

[34] BY MR. BENJAMIN:

Q Well, okay. Let's start over again. The R.R.H. [R.R.H.A.] pamphlet –

THE COURT: That's not a legal document. It's just something that they circulated before they privatized the streets to give the neighborhood some idea of what it was about, so they could object.

BY MR. BENJAMIN:

Q The definition of unauthorized person that appears in this pamphlet, is that still accurate as far as you're convened?

A You're asking for a definition. This is a couple of examples of what authorized persons may be. This is not a definition here, sir.

Q Well, let me ask you this: If a nonresident is on housing community property, and they can't demonstrate that they are visiting a lawfully residing resident, are they authorized to be there or unauthorized, as far as you're concerned?

A The question you ask is, if [35] a person is in back of some units or hanging with some guys and drinking on a corner and the police go up to them and ask them –

Q No. That's not my question. My questions is: If there is a person on housing community anywhere –

A Anywhere on the property?

Q Yes, ma'am.

A On privatized property?

Q That's right. On privatized property.

A On privatized streets. Okay.

Q And if that person cannot demonstrate that they are visiting a lawfully residing resident, they're unauthorized, aren't they?

THE COURT: Or live there.

THE WITNESS: They live there or conducting business there or taking a short cut or are they standing? You're asking me an absolute question that I don't think I can answer, sir.

[36] BY MR. BENJAMIN:

Q Well, then I'll – let me try again.

A Okay.

Q I'll get it. Let's say that somebody who is not a resident is seen on public housing property that had been privatized, are they considered an unauthorized person, if they are unable to demonstrate that they are not there – they are unable to demonstrate that they are visiting a lawfully residing resident?

THE COURT: Or conducting business.

MR. BENJAMIN: Well, there's others.

THE WITNESS: I don't think I can answer just one part of that, because there's a lot that goes through that definition, sir. There's a lot.

BY MR. BENJAMIN:

Q I'm going to include the Court's suggestion.

A Okay.

[37] Q Here with [sic] go again. I'm sorry. It's taking me a bit.

If a nonresident is seen on privatized public housing property and he cannot demonstrate that he is either visiting a lawfully residing resident or conducting legitimate business, is he an unauthorized person?

A Considered unauthorized? Yes.

Q What is – The policy of R.R.H.A. regarding the presence of unauthorized persons on privatized public housing property is to enforce the trespass laws?

A Repeat that again.

Q If you are an unauthorized person – an unauthorized, nonresident on the premises of privatized public housing property, the policy is that such unauthorized persons will be prosecuted for trespassing?

A I think the answer to your question is that, the police department can, number one, bar them or warn them; and the police department according to the rules and [38] regulations can follow through on that, sir.

Q Well then, as far as you know, can unauthorized persons lawfully be present on the Whitcomb Court property?

A Can they?

Q Yes.

A Like right now, if that person may be "unauthorized" it's very probable, sir.

Q So it is permissible for someone to be – as far as your concerned –

A Permissible? No. I'm not going to say it's permissible, sir. I'm not going to say that to you at all. Because the privatization and no trespassing rule was because the residents were tired of their safety being compromised by nonresidents.

Q I understand the "history."

A Okay.

Q You, as housing manager, gets to determine who is properly on that property or not. That's part of your job, isn't it?

A I would say yes.

[39] Q And if someone is not properly, legitimately on your property, then you can say so to the police that person is not authorized?

A Correct. And they're not tenants.

Q And the policy is at H.H.R.A. [R.R.H.A.] to enforce trespass laws against unauthorized people who are present on R.R.H.A. property?

A Correct.

Q Once somebody has been banned from R.R.H.A. property, what can they do to get off the list or to get permission to come back on the property?

A They can submit in writing a request to the director of housing operations.

Q Who is that person?

A Solomon Akinwande, he's the supervisor of all the housing managers.

Q It is possible to get off of that – to get an exception to having been banned?

A I've had persons to come in [40] and ask for a request that's been submitted to Mr. Akinwande.

Q Are their [sic] any public guidelines governing under what circumstance somebody can get off that list of people who have been banned?

MS. REINER: Your Honor, I object to the relevance.

MR. BENJAMIN: Goes to overbreadth, Your Honor, and vagueness.

THE COURT: Mr. Benjamin, your question here to my understanding, is whether or not this was private property.

MR. BENJAMIN: No, sir.

THE COURT: Oh, it's not?

MR. BENJAMIN: No.

THE COURT: Okay. Well, continue, please. Well, I'll tell you what, I'll give you 45 minutes to finish whatever it is you want to put on the record without any objection from anybody.

MR. BENJAMIN: Thank you.

THE COURT: All right?

MR. BENJAMIN: Yes, sir.

THE COURT: Put it on the [41] record.

MR. BENJAMIN: Yes, sir.

THE WITNESS: You asked me a question of what guidelines I would have to follow. I don't have a knowledge of those, sir. I do not know. I do not have any knowledge of what guidelines I may or may not follow.

BY MR. BENJAMIN:

Q Do you know of anybody ever having been taken – removed from banned status?

A No.

Q People have come to you asking for permission to visit people after they have been banned?

A Correct.

Q And you've never given anybody permission?

A I've explained to them the policy, they can request in writing, they make those requests to Mr. Akinwande for residents.

Q You've before never given anybody permission?

[42] A No.

Q If an organization wanted to use the privatized street or sidewalk in a housing community in order to hold some sort of demonstration, in order to walk back and forth with signs in support of some sort of political position, would they be permitted on the property if they were nonresidents?

A They could get permission first. And I would say, again, I need it in writing to see the nature or whatever. They need permission first to be on the property.

Q Are you in a position – does your position enable you to tell people – to give people permission to come on and picket or demonstrate on housing community property?

A I'm not sure what you're asking. To picket? I've had people to call to pass out flyers, and asked to have church services. And these are things I'm used to.

As far as picketing and stuff, I never had that so I'm not familiar with it.

Q Let's talk about what you're used to.

[43] A Okay.

Q With situations such as those, people wanting to pass out flyers for example, or hold church related meetings, do they have to come to you for permission?

A Yes.

Q Then do you give permission?

A Depending on the circumstances, sometimes it's granted, yes.

Q Sometimes you do and sometimes you don't?

A Correct.

Q Are there any particular guidelines, criteria that you refer to determine whether or not any group or type of religion will be allowed to circulate any of those things?

A Yes. I refer all those to community council and they meet with the board and the residents to decide, because there's so many residents and so many things, the City Council and housing management work out – we're not – we don't rely on – we don't mind a one time only religious – we don't want [44] every week or what have you. And they set up the guidelines on whether these services can take place.

As far as passing out flyers, you know, I was asked to grant and hopefully it's not solicitation or selling or those type things.

Q What flyers are permitted? Is somebody permitted to come in there and pass out flyers?

A Everyone who comes in to pass out flyers, do not come by me. So I see them if they come and ask permission, those are the type of things I look for.

Q If somebody comes to you and asks for permission to hand out flyers, do you give them permission?

A Once I look at the flyer and it's not – it's just church services or inviting to a community day or those type of things, you know, a flyer I'm used to seeing, I do not deny anyone permission to hand out flyers, the ones that I have seen.

Q In those situations, it is up to you; is that correct?

[45] A Only up to me – If it's something I'm uncomfortble with, I will refer it to Mr. Akinwande, if it's not routine that I'm used to seeing, I just kind of refer it to Mr. Akinwande to get approval at that point.

Q Who is that person?

A Assistant director of housing operations. He's my immediate supervisor.

Q When trespassing arrests are made, do the police advise you of who they have arrested for trespassing on public housing property?

A Yes.

Q Do they – in a situation where that person has claimed to be connected with a particular resident or particular apartment, do the police advise you of that?

A Yes.

Q Have the tenants been advised that if they acknowledge someone as their guest, they tell the police, oh,

yes, he's my guest or whatever, have the tenants been told in that situation that if that person isn't lawfully a guest, that's a [46] problem?

A If the police tell me that they have arrested somebody for trespassing or they are questioning somebody about being unlawfully on the property, and the person stated that they are a guest of a certain household, that have been barred from the property, at that time I call the resident and let them know this person has been barred and inform them of the policy at that time. And yes, I do let them know.

Q Do you let them know that if that sort of conduct continues, that they are jeopardizing their lease?

A Do I let the person know that if they allowed a barred person on the property, that they could be jeopardizing their lease? Yes, I do.

Q Once a person is banned, they're not permitted to go on the property; is that correct?

A I hear your question, but after Mr. Hicks had been here two – not with permission, he came to the talk, you know, twice after he was barred.

[47] Q Okay. I guess you're pointing out the distinction that even though – Well, when he came to talk to you, that was unauthorized?

A He was still unauthorized at that point.

Q That was an unauthorized presence; right?

A Uh-huh.

Q And you didn't have him arrested for trespassing on those two instances, did you?

A No.

Q But you could have?

A Right.

Q On both of the occasions that he came to talk to you, was he trying to get permission to come back onto the property?

A Yes, he was.

Q Did he explain to you that his mother resided on the property?

A Yes.

Q Did he explain to you that the mother of his children resided on the property?

[48] A Never. No.

Q No?

A Huh-uh.

Q Was he asking for permission to come visit his mother?

A There was a conversation I know when we were in this courtroom, him and – and I talked to her before, and I know he asked permission during the conversation, and I explained to him, he had been barred, you know, and I'm not granting that permission.

Q And he's not the first person, is he – Once people are banned, even though their parents or their children or

other family members live on the property, they still aren't permitted to come back onto the property?

A We advise them to see these persons outside of our property, sir. We do not come between families. We advise them to see them outside our premises.

Q Just so it's on the record that – that's correct that they cannot come back on the property; correct?

A Correct.

[49] Q Did you know of any formal trespassing policies for the police in their enforcement of trespassing laws –

A I cannot answer that question.

Q – on public housing property?

A I cannot answer what rules and regulations they follow. I'm not qualified to answer that.

MR. BENJAMIN: Your Honor, if you bear with me for a moment, I might be way short of your 45 minutes.

(Pause in the proceedings.)

BY MR. BENJAMIN:

Q If you get the feeling that you've already answered this, you may have. Once someone has been banned from the property, even if a resident invites them onto the property as an invited guest, they still aren't allowed to go on public housing property; is that right?

[50] A You're asking me a question – I think I hear what you're saying, and I'm not going do [sic] answer that

question. I don't think you're asking me something and I think it's a line there. Ask that question again, please.

Q Sure.

A Once they're barred from privatized property, and they're back on the streets or sidewalks, they are unauthorized. They're barred.

Q Period? It's not a trick question.

A Okay.

Q I'm just getting another example, if you will. So if a lawful resident of the public housing project invites someone who has been barred from the public housing property, even if they're invited, that's still not an authorized presence?

A That's correct.

Q And if they've been barred from the public housing project and they are back on the property for some other purpose that ordinarily would be considered [51] legitimate, that's still not an authorized presence; right?

A Once they've been barred and have been informed they're not to come back on the property, and they come back on our property, then they're not authorized to be on that property. I agree with you.

Q Okay. The only way – How does somebody demonstrate that they're visiting a lawfully residing resident?

A What the police would do, one of two things. The police actually knock on the door and ask the person in 2302 is the person your guest. They walk the person to the door and knock and ask them, is this person your guest

and whether you live here or not. The police will work with them to get to that point.

Q Have you had a problem where some of the residents have maybe harbored people who really weren't their guests? Who have said, you know, Oh, yes, he's my guest, when that really wasn't the case?

A Since the police department [52] do most of that, you'd have to ask them that. Because I'm not the fair one to answer that question. The police go there and do that check.

Q Are there any other ways that people who are on the property claiming to be visiting a resident, can demonstrate that they are actually doing that, visiting a resident?

A I think the main thing is, if they are visiting somebody they should be at home. If you live at 2302 Carmine Street, and the person comes out and says this is my guest, then I would assume that would be – I would assume that would be that person.

I don't know if that – they don't ask for a list of guests or that type of thing. I don't – I'm not sure what you're asking.

Q If somebody is just standing around on the street corner?

A Okay.

Q And they say they're visiting a resident, and that resident when they're asked vouches for them, oh, yes, that [53] person is visiting me; is that okay? Is that authorized?

A Has that person been barred?

Q No. Not barred. Just standing on the street corner.

A I have known police to walk them to the door of the person who has said, yes, that's my guest.

Q Then is it your position that if a resident of the housing community says that a person standing on the street corner is there [sic] guest, that it's authorized for that person to stand there on the street corner?

A No. The police – I'm hearing – We ask the police to do or we suggest that they do, if you're at 2302 Carmine Street, you should be at 2302 Carmine Street. And so we had asked residents to, you know, if guests are coming to see you they should be in your yard or be on your property area assigned to you. And so I don't think it's reasonable for your guests to be one place and you be somewhere else.

[54] Q I understand. And that's your position?

A Again, the police department enforces – you're asking me how I view it. I'm telling you how I think I view it. But they enforce it. They will walk up to the address or what have you. But a person standing at the corner of Belvidere and Forest visiting a person at 2302 Carmine Street.

Q What?

A Well, who are they visiting?

Q That person in that situation would not be able [sic] demonstrate that they were –

A But I told you the police would – I've known them to walk them to that address and a person said I just

stopped here and was visiting such and such. And so the police had asked them to explain to them the policy or what have you, explain to them about being on the property as a guest or what have you.

Q And the policy, if I understand –

[55] A And the police explain to them – like I say, I'm not sure which law they're following, I'm not a police officer. I don't know that part of it.

Q The policy is that, I guess, you ought to be at the place that they're visiting or on their way to and from?

A Well, that's right. I mean, that's reasonable.

THE COURT: Isn't the reason for most of this is the drug market that they had?

THE WITNESS: Yes, sir.

THE COURT: And regardless of whether the party has somebody that lives in there or not, do you allow them to be barred if they hang around the drug market?

THE WITNESS: The reason why we ask that they be identified as their guest, in the new lease that we did a while ago, we can hold tenants accountable for their guests' action. And so if the person on our property is dealing drugs and they are a guest of that person, then they can lose their apartment.

[56] So that's why the police would ask them are you a guest of this house or who you are going to see, because with the open-air drug market, we have people who out at the home site – we had – not one of ten were residents, but they were arrested on our property. Even now, eight of ten

persons are not residents. Our residents don't want them coming on our property doing that type of thing.

So we did the lease over a little while ago, we've made our tenants more accountable for their guests' actions. That's why the policemen ask them are you a guest, who are you visiting. And like I said, if the person is a guest on our property doing the wrong thing, they can be barred and/or arrested. But if that guest has drugs on our property, the family can also be held responsible for their guests' actions.

BY MR. BENJAMIN:

Q Do the police ever come to you asking for a policy about a particular person or –

[57] A Policy about a particular person? I'm not sure of your question, sir.

Q Do you ever communicate to the police your policy or the R.R.H.A. policy about authorized, unauthorized people on the premises?

A The only thing I can say to you is, that if they question me, Is MaryJo a tenant at 2302, I can confirm whether or not she is a tenant. They ask if John Doe is a tenant at 2523, and we saw John Doe again and asked if he lived at this address. Is that what you're asking? I'm not sure –

Q Well, let's say somebody is on the street passing out flyers, do the police come to you and ask you, is this person supposed to be here?

A I don't believe that's ever happened.

Q Do you have police assigned full time to –

A We have an R.R.H.A. squad who work all our communities, in addition to regular beat offices or what have you.

Q The streets – the privatized [58] streets are maintained by the City?

A Sir, that's all in that document. I do not know how to answer that question, because maintained – we clean the trash up. But as far as maintenance or whatever, all of that's in that document. And I do not know how to answer that question.

Q The last time we had any snow or ice, was it City machines that came and cleaned it?

A I don't recall. We didn't have any last year, remember?

Q It all fades into –

MR. BENJAMIN: Your Honor, I think that's it. I would introduce as Defense No. 4 the pamphlet that was distributed to –

THE COURT: Thank you, Ms. Rogers.

MR. BENJAMIN: Do you have that pamphlet?

(Document proffered to the Court.)

[59] (Defendant's Exhibit No. 4 entered into evidence.)

Your Honor. I have no further evidence.

* * *

[64] MR. BENJAMIN: Well, that's unconstitutional and not right. That's just not right.

That's my argument.

THE COURT: Okay.

MR. BENJAMIN: In addition to the law.

THE COURT: I deny your motion.

* * *

[1] VIRGINIA:

IN THE CIRCUIT COURT OF THE
CITY OF RICHMOND

JOHN MARSHALL COURTS BUILDING

COMMONWEALTH OF VIRGINIA	:	CASE NOS.: M-99-1605 to 1609
vs	:	(Filed Sep. 24, 1999)
KEVIN LAMONT HICKS	:	

Complete transcript of testimony and other incidents in the above BENCH TRIAL AND REVOCATION HEARING, when heard on July 29, 1999, before the Honorable THOMAS N. NANCE, Judge.

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Kevin Lamont Hicks,
the defendant herein,
present in person.

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[4] NOTE: Court is reconvened at 1 p.m.; the court reporter having been duly sworn, the defendant being present, the hearing is had [sic] as follows:

MS. CLERK: Case of the Commonwealth versus Kevin Lamont Hicks.

The defendant is present in court, is represented by Steven Benjamin.

Counsel, are you prepared to proceed?

MR. BENJAMIN: Yes, ma'am.

MS. CLERK: Commonwealth is represented by Russell McGuire.

Counsel, are you prepared for the Commonwealth?

MR. MCGUIRE: Yes, ma'am.

MS. CLERK: We're proceeding on the trespassing and fail to appear first?

MR. BENJAMIN: Yes.

MS. CLERK: File M-99-1606. You stand charged in this summons that on or about January 20th, 1999, in the City of Richmond, you did unlawfully trespass on RRHA property.

[5] How do you plead, guilty or not guilty?

THE DEFENDANT: Not guilty.

* * *

[6] MR. BENJAMIN: We'd move to exclude any witnesses, Your Honor. One of our witnesses, Maria Pryor, is in the hall already.

MR. MCGUIRE: We would have the same motion.

Commonwealth would call Officer Laino.

JAMES J. LAINO,

a witness called by the Commonwealth, first being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MCGUIRE:

Q Sir, please introduce yourself to Judge Nance.

A Officer James J. Laino, L-A-I-N-O, Richmond Police Department.

Q Were you so employed on or about 1/20/1999?

[7] A Yes.

Q On that day in the city of Richmond, north of James, did you come in contact with the defendant seated next to defense counsel?

A Yes, sir, I did.

Q Is that the gentleman there?

A Yes, sir.

MR. MCGUIRE: Let the record reflect that the witness has identified the defendant.

BY MR. MCGUIRE: (Continuing)

Q Please let the Court know how you came into contact with him.

A I was driving, it would be eastbound on Bethel Street, 2300 block. I observed Mr. Hicks. He was walking westbound on Bethel Street, 2300 block. I stopped my police car. It was approximately in front of 2340 Bethel Street.

Q That's RRHA property?

A Yes.

MR. BENJAMIN: Objection to, this is RRHA property, and any hearsay on which it is based.

THE COURT: All right.

[8] MR. MCGUIRE: Would you like me to respond, Your Honor?

THE COURT: Well, continue or respond, either one.

MR. MCGUIRE: Well, I would just say that you can either take judicial notice of that or the officer can tell you how he knows. It's not hearsay. It's something that he knows as a police officer. It's capable of fast determination. I would ask that you take judicial notice.

THE COURT: You want to try to lay some foundation for it and then ask him some questions.

MR. MCGUIRE: Certainly. yes, sir.

BY MR. MCGUIRE: (Continuing)

Q How did you know that was RRHA property?

A I've been working first precinct for five years, over five-and-a-half years. Whitcomb is RRHA. At one time, I was assigned strictly to Richmond Redevelopment Housing Authority, and Whitcomb was my assignment for over [9] a year.

Q That's RRHA property?

A Yes, Whitcomb is part of RRHA property.

MR. BENJAMIN: May I voir dire?

THE COURT: Yes.

VOIR DIRE

BY MR. BENJAMIN:

Q Officer, what you're saying is that, that has always been considered and regarded by you and others as RRHA property. What is the basis of your belief that Bethel Street is part of RRHA property?

A Whitcomb Court is made up of Whitcomb Street DeForrest Street, Bethel Street, Carmine Street, Ambrose Street, Anniston Street, and part of Magnolia.

Q You saw the defendant on Bethel Street?

A Yes.

Q He was walking in Bethel Street?

A He was walking on the sidewalk, [10] yes, sir.

Q Now, you don't know, do you, whether that walk where you saw him belonged to RRHA or to the City of Richmond, do you?

A Yes, I do, sir.

Q What is the basis of that knowledge? How do you know that?

A I don't know the exact date, sir, but at one time they did privatize the streets, and everything from Whitcomb Street to Carmine Street is privatized.

Q How did you know that?

A I was told that. And, yes, it was presented to us in a packet. I don't have the packet with me, sir.

MR. BENJAMIN: All right, sir. Your Honor, I renew my objection that his statement as to ownership of the sidewalk where he saw the defendant is not only a legal conclusion, it's also premised upon hearsay. He knows it because of something that was told to him and he read.

THE COURT: I overrule your objection.

[11] MR. MCGUIRE: Thank you.

BY MR. MCGUIRE: (Continuing)

Q So it was RRHA property?

MR. BENJAMIN: Same objection.

THE COURT: Continue, please.

BY MR. MCGUIRE: (Continuing)

A Yes, sir.

Q And then what happened next?

A I stopped my police car and started to speak with Mr. Hicks. I said, I know you're not supposed to be out here. I forget his exact response. He said he was just getting pampers for his baby, at which time I wrote him a summons for trespassing.

Q All right. Is the property posted?

A Yes, on each building. The property's posted on each side of the building. So there's one on each side of the building, so there's four sides of each building. Then on the street, they have signs every say 100 feet, red and white, that say these streets are privatized and all the property is privatized, no trespass.

Q How big are the signs?

A The signs are –

[12] MR. BENJAMIN: Your Honor, maybe, for purposes of the record, the objection, sir, is if the signs are being introduced to prove ownership or the fact of privatization, then it's hearsay, and I object on that basis.

THE COURT: Overruled. Go ahead.

BY MR. MCGUIRE: (Continuing)

A The red and white signs, I would say approximately 18 inches to almost 24 inches by about 12 inches, and they're probably spaced about every hundred feet on each block.

Q Are they obstructed?

A No.

Q Was this in the day time or night time?

A This occurred at 8:52 in the evening time.

Q Do you know whether it's lit or dark?

A There are street lights out there at Whitcomb Court. So it's well-lit. I would consider well-lit.

MR. MCGUIRE: Please answer any [13] question Mr. Benjamin or the Court may have.

CROSS EXAMINATION

BY MR. BENJAMIN:

Q Did he explain to you that the mother of the baby lived there in Whitcomb Court?

MR. MCGUIRE: Objection to the hearsay, Your Honor.

THE COURT: Overruled.

BY MR. BENJAMIN:

Q Did he explain to you that the mother of the baby that he was getting the pampers for lived there?

A He stated he was bringing pampers to his baby.

Q Then did a female come out and join you all?

A Just about at the end, she did walk up.

Q Did she identify herself as the person he was visiting?

MR. MCGUIRE: Objection to the hearsay, Your Honor.

[14] THE COURT: Overruled. Go ahead.

BY MR. BENJAMIN: (Continuing)

A I don't recall the conversation between her. I don't even recall speaking with her. I'm not sure – I believe he motioned [sic] that, that's who I was visiting right there.

Q All right. Did you know her or recognize her to be a resident of Whitcomb Court?

A No, sir.

Q You don't know either way?

A Whether she's a resident, no, sir.

Q Were there other officers there?

A Myself and Officer Tovar.

Q Was Officer Hannah present?

A No.

MR. BENJAMIN: May I see the warrant, Your Honor?

THE COURT: The summons?

MR. BENJAMIN: Yes, sir.

THE COURT: Have you had contact with him before? You said you knew he wasn't supposed to be there.

[15] THE WITNESS: Yes, I've known Mr. Hicks probably three-and-a-half, four years.

THE COURT: Three-and-a-half, four years?

THE WITNESS: I've known him for a while, yes.

THE COURT: Have you arrested him for trespass?

THE WITNESS: I don't remember if I've actually arrested him, but he's been arrested before for trespassing out there and I've been present.

MR. BENJAMIN: Your Honor, I would have to object to this on undue process grounds and hearsay grounds and relevance grounds.

THE COURT: All right. But you've been there when he was arrested for trespass?

THE WITNESS: Yes, sir.

THE COURT: All right.

MR. BENJAMIN: Same objection. I'd ask you not to consider any of that.

THE COURT: All right.

[16] MR. BENJAMIN: Could I have a ruling?

THE COURT: Your objection is –your request is denied. I will consider it.

MR. BENJAMIN: All right, sir. Thank you. I don't have any further questions for the officer.

THE COURT: All right.

MR. MCGUIRE: That's all from the Commonwealth.

WITNESS STOOD ASIDE

MR. MCGUIRE: The Commonwealth would call Gloria Rogers.

[17] GLORIA ROGERS,

a witness called by the Commonwealth, first being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MCGUIRE:

Q Ma'am, please introduce yourself to Judge Nance.

A Gloria Rogers, housing manager at Whitcomb Court, Richmond Housing Authority.

Q And, ma'am, were you so employed in the year of '98 and 1999?

A Yes.

Q Ma'am, taking your time back. Have you ever come into contact with the defendant, Kevin Hicks, before?

A Yes.

Q All right. Please tell the Court, has he come and have you banned him from the property?

A Yes.

Q All right. Please tell the Court how that came about?

A It came about in two respects. Number one –

[18] MR. BENJAMIN: Objection to relevance.

THE COURT: Overruled.

BY MR. MCGUIRE: (Continuing)

A Number one, when the police see a person in the development and they say that they live someplace, they confirm with the office. And Kevin Hicks, they quite often saw him in the development and he gave them an address and I would pull the file and confirm he didn't live there.

Secondly, because of the domestic violence in the development.

MR. BENJAMIN: I'm not sure where the Commonwealth is going with this, but there's also a hearsay objection.

THE COURT: I know. Ma'am, have you told him to stay off the property before?

THE WITNESS: Yes.

THE COURT: How many times?

THE WITNESS: I talked to Kevin Hicks in person twice.

THE COURT: And he's been arrested for this in the past?

[19] THE WITNESS: Yes.

THE COURT: Did you go to court with it?

THE WITNESS: Yes, I was in this same courtroom with him before and we gave him the paper barring him from our property.

THE COURT: You gave him a paper?

THE WITNESS: Yes.

THE COURT: Telling him not to come back?

THE WITNESS: Yes.

BY MR. MCGUIRE: (Continuing)

Q Did he sign that at as well?

A Yes.

Q Do you have that with you?

A (Witness complies.)

Q And do you keep that record, ma'am?

A Yes.

Q And in the course of your business as housing –

MR. BENJAMIN: Hold on just a second. Before this is admitted, may I [20] voir dire?

THE COURT: Sure.

VOIR DIRE

BY MR. BENJAMIN:

Q Ms. Rogers, the paper that you handed to the Commonwealth attorney, did you see the individual sign it?

A Yes.

Q In your presence?

A Yes, right outside this courtroom.

Q Was it the same individual here?

A Yes.

Q And it was this courtroom?

A It was on this floor.

Q I understand.

A It was on this floor. It was in the Circuit Court.

MR. BENJAMIN: Thank you.

[21] DIRECT EXAMINATION

BY MR. MCGUIRE: (Continuing)

Q And, ma'am, was that on 4/14/1998?

A The date on the paper, yes.

MR. MCGUIRE: Okay. I'd move to introduce this at this time, Your Honor.

MR. BENJAMIN: Objection to the hearsay as to the date, Your Honor, if the writing is being used to establish the date of the notice. That is hearsay.

THE COURT: Well, ask the lady.

MR. MCGUIRE: Was the –

THE COURT: Did you date it on the date he signed it?

THE WITNESS: Yes. It was in the court as he walked out. We did it that same day and got him to sign it.

THE COURT: On the 14th?

THE WITNESS: Whatever date was on there. Hand delivered in court 4/14/98. That's my handwriting. I put that on there. That's the date. The officer signed and he also signed it the [22] same day. And all three dates are the same, Your Honor.

THE COURT: Right.

MR. MCGUIRE: At this point, we would introduce this document.

MR. BENJAMIN: And our objection to that is that it does not fall within a hearsay exception, Your Honor. It's still hearsay.

THE COURT: Objection denied.

NOTE: The above-referred-to document was marked and filed as Commonwealth's Exhibit No. 1.

THE COURT: Go ahead.

BY MR. MCGUIRE: (Continuing)

Q And, ma'am, have you also given the police department, the Richmond Police Department authority to arrest people trespassing on your property?

A Yes, it has been done.

MR. BENJAMIN: Objection to that. That's hearsay and also a legal conclusion.

[23] THE COURT: Continue.

BY MR. MCGUIRE: (Continuing)

Q Do you keep records of whether or not authorizations are made to the police department?

MR. BENJAMIN: I'm sorry. But I do need a ruling.

THE COURT: What was your objection?

MR. BENJAMIN: The objection was to whether or not the police force has received authority to act as agents, essentially, for RRHA.

THE COURT: From her?

MR. BENJAMIN: She says it has been done. My objection is –

THE COURT: From you, ma'am?

THE WITNESS: They have been done by – I know the Housing Authority has given the police department authority to make arrests. And here's a copy of the paper from the Housing Authority. So I'm not sure –

THE COURT: That's all right. Don't worry about the legal aspect. Just [24] answer the question. The objection is overruled. Go ahead.

MR. MCGUIRE: Thank you, sir.

BY MR. MCGUIRE: (Continuing)

Q The authority has been given to the police and you have that document with you. Is that an accurate reflection of the authority that has been granted?

A Correct.

Q Okay. May I see that?

A (Witness complies.)

MR. BENJAMIN: My objections to testimony based upon this document and to your receiving this document into evidence are as follows: Number one, best evidence objection. This is, obviously, a fax from somebody. Secondly, any testimony based upon this document calls for a legal conclusion, which this witness is not qualified to give. And, thirdly, that any testimony based upon this document and this document itself is hearsay. Those are my objections.

THE COURT: Objections [25] overruled.

MR. MCGUIRE: Move to introduce, Your Honor.

NOTE: The above-referenced-to document was marked and filed as Commonwealth's Exhibit No. 2.

* * *

[29] THE COURT: Is that the Commonwealth's case?

MR. MCGUIRE: That would be the Commonwealth's case, Your Honor.

THE COURT: All right. Grant your motion on fail to appear.

MR. BENJAMIN: Yes, sir. Let me take just a second.

We have no evidence, Your [30] Honor. Defense rests.

* * *

[32] THE COURT: I find him guilty of trespassing.

MR. BENJAMIN: All right, sir.

THE COURT: What kind of record does he have? What have you all agreed on?

MR. BENJAMIN: I think what you have before you, you have two summonses or warrants reflecting criminal convictions, both of them for trespass. One was a conviction dated February '98 with an offense date of November 12, '97. [33] The other is a conviction date of June '98 with an offense date of April 20, '98. And those two I will submit to the Court. I agree to those.

You also have an NCIC printout. And I've found such inaccurate information on those in the past, Judge, that I never trust them. So I'll submit it to you for whatever – I'm objecting to you even considering it, because those printouts contain all kinds of stuff.

THE COURT: I'm not going to consider that in this case.

MR. BENJAMIN: Yes, sir.

MR. MCGUIRE: Your Honor, I would also ask that you then take in mind the matters that are being show caused as well as the prior record.

THE COURT: Well, these are not those?

MR. MCGUIRE: I am not sure 100 percent, Your Honor. I apologize. But I believe there's more than two show causes.

THE COURT: Now, see, he has [34] three show causes?

MS. CLERK: Yes, sir.

THE COURT: This one is February 10, '98. This is an April 27th case. And this one is June 26, '98. So it's one additional case.

MR. BENJAMIN: Right.

THE COURT: Which was April 27th, '98. All right.

Care to be heard on punishment?

MR. BENJAMIN: I'd like you to hear from Mr. Hicks.

THE COURT: All right.

THE DEFENDANT: Judge, I'd like to say, prior to all the trespassing charges that I have, it was all due to the fact of me trying my best to take care of my children and make sure that my girl get everything that she needed. I know by me catching trespassing charge, I did wrong, but all I can say is I just did it for my kids. And if I can get any kind of slack off this right now, I promise you I will never trespass on RRHA property again, because right

now, I have [35] an 8-month-year-old girl and a 4-year-old son that I'm really trying to be with.

THE COURT: Son, don't you recognize that by doing this is the worse thing you could do for your child?

THE DEFENDANT: Yes, sir.

THE COURT: I mean, you're going away. I'm going to tell you now. Don't you realize what you're doing to the baby, the baby's mama, your own mama? How many times you been convicted over there? I'm looking at four. You know, probably more.

THE DEFENDANT: Your Honor, I never got into no kind of trouble. Never. Every time it seems like as far as the trespassing charge, it always be because my kid. I mean, she don't have no phone, so I be back and forth to the house just making sure she have everything.

THE COURT: On this current case, I sentence you to 12 months in jail and pay $1,000 fine. I suspend that time and the fine on the condition you keep [36] the peace, be of good behavior, not violate any laws for the next five years. Pay the costs.

THE DEFENDANT: Thank you.

THE COURT: Now he has a revocation hearing.

MS. CLERK: Your Honor, we have before the Court three abuse of discretions. Do you want each one read?

THE COURT: Yes.

MS. CLERK: File M-99-1605. You stand charged in this show cause summons that you previously were

charged with trespassing, the conditions of the suspended sentence were violated.

How do you plead, guilty or not guilty?

THE COURT: Conditions of suspended sentence of what date?

MS. CLERK: I'm sorry, Your Honor. Of June 26th, 1998.

Do you plead guilty or not guilty?

THE DEFENDANT: Not guilty.

MS. CLERK: File M-99-1607. [37] You stand charged in this show cause summons that you were previously charged with a trespassing and you violated the terms of the suspended sentence. And, Your Honor, this was suspended on April 27, 1998.

How do you plead, guilty or not guilty?

THE DEFENDANT: Not guilty.

MS. CLERK: File M-99-1609. You stand charged in this show cause summons that you were previously charged with trespassing and violated the conditions of the suspended sentence. And the date of the conviction, Your Honor, is February 10, 1998.

How do you plead, guilty or not guilty?

THE DEFENDANT: Not guilty.

THE COURT: Mr. Benjamin, do you want to accept the evidence as heard in the previous case?

MR. BENJAMIN: Yes, sir, with the same objections.

THE COURT: All right. That's [38] in the trial of the case and the previous hearing?

MR. BENJAMIN: Yes, sir. Same objections.

THE COURT: All right. I'll be glad to hear you or hear any evidence you have as to why the Court should find that the district judge abused its discretion.

MR. BENJAMIN: Yes, sir. Also when I say same objections, please understand that I also mean I object to the enforcement of the trespassing policy as has been described in the previous hearing, be it use of the revocation proceedings as part of that. I think – I'd also ask you to accept the transcript that had been tendered in the earlier hearing of the proceedings before the Richmond General District Court.

The objection that we have placed before you at an earlier time was that Mr. Hicks was denied his right to due process by the participation of the trial court judge a prosecutor and advocate in that proceeding. We'd ask [39] the Court to remand the matter for the trial in the General District Court which Mr. Hicks was entitled, and the Court ruled that it did not have the authority to do that. We renew our objection and submit that you do have the authority to do that.

I would submit the transcript from General District court as evidence of the abuse of discretion. I think what it speaks to, I think, is the embodiment of the court, the judge acting outside the proper exercise of discretion during that hearing.

The only other thing I would say is that Mr. Hicks's mother and his aunt and the mother of his two infant children live in Whitcomb Court. And although he has

been told – the evidence you have heard is that he's been told not to come onto that property, he keeps coming. I think that, that is a compulsion, an instinct, and a longing that is inherent in all of us. And I think that when the City of Richmond and [40] the Housing Authority take it upon themselves to decide that the answer to solving the crime or drug problems is to keep family members apart, that you're just – that's an abomination. And maybe I'm doing more preaching than I should.

THE COURT: Well, you know, don't forget the testimony, Mr. Benjamin, about drug dealing out there and him hanging out on the corner.

MR. BENJAMIN: Not by him. There has been no testimony that he was hanging on the corner, that he had any connection with any type of drug activity out there. I am fully aware that, that neighborhood has experienced problems with drugs.

THE COURT: That's probably the reason that they did what they did to set it up in a private situation where they could declare private property in order to try to control the crime. I don't know that your client is involved. He seems like a nice young man to me. But I know one thing, he's my number one [41] candidate for the award for hard-headedness. Keep going back time and time again. He's a Coolhand Luke of the projects over there. And he's just got himself in such a bad situation, I can't get him out of it.

MR. BENJAMIN: Well, you can. You can. And that's what I'm asking you to do and I –

THE COURT: Unless I totally abandon my oath.

MR. BENJAMIN: No, you know I disagree with you there. Because this would be different if, you know, on any one of these occasions, if they had caught him with crack in his pocket, you know, I'd have a little bit harder time making this pitch.

And you know that part of the reason, part of the – one of the reasons this policy works so well is that it permits officers to stop and detain somebody and investigate whether they are violating the trespass laws. And a lot is accomplished by the ability then of [42] the officers to either do a patdown or if they are trespassing, to do is [sic] full search. It is a very efficient way of finding drugs. So you know if he had, had drugs on him, they would have found them and this would have been a totally different case. This is a situation where the absence of evidence is the best thing I've got.

THE COURT: Does he have any other record?

MR. BENJAMIN: I think there was some discussion of a property damage. There are no drug offenses. He has got nothing to do with drugs. And that's what I keep returning to, because I think it's the most compelling argument. He is maybe hard-headed, but a hard-headed kid, nevertheless, who just kept wanting to see his mother and his babies.

THE COURT: I don't buy that. Anything further?

MR. BENJAMIN: No, sir.

THE COURT: I find on the evidence, not based on the conviction in [43] the other case itself, but on the evidence, that he has violated the terms of the previously suspended sentence. I sentence him on 1605 to 12 months

in jail; 1609, 12 months in jail; and 1607, to 6 months in jail to run concurrently.

Mr. Hicks, I cut your sentence in about a third or by a third. But if I see you again, son, in the next five years, I'm going to give you the 12 months and I'm going to try to see that you have to do it all.

If he has a job, Mr. Benjamin, I will consider work release. But you'll have to get that together and bring it to me.

MR. BENJAMIN: Yes, sir, he does have employment.

THE COURT: He'll have to get with his employer, get a statement from him, the hours he works, somebody who will be willing to work with the police department. Call my secretary and put it back on the docket.

MR. BENJAMIN: Yes, sir.

[44] THE COURT: That's all.

MR. BENJAMIN: May he say one further thing?

THE COURT: Yes.

THE DEFENDANT: Your Honor, I'm really trying to be with my kids, Your Honor. I have a 4-year-old son.

THE COURT: Mr. Hicks, you need to understand, the world doesn't revolve around you.

THE DEFENDANT: I know that. I know that. But all I'm saying is if you can cut me any kind of slack to where I can get no jail time so I can be with my kids.

THE COURT: That will never happen, son.

(Whereupon the proceedings ended.)

AN ORDINANCE No. 97-181-197

[OFFERED MAY 27, 1997]

[ADOPTED JUNE 23, 1997]

To close to public use and travel Carmine Street, Bethel Street, Ambrose Street, Deforrest Street, the 2100-2300 Block of Sussex Street and the 2700-2800 Block of Magnolia Street, in Whitcomb Court, as shown hatched on a plan prepared by the Department of Public works, and designated as DPW Drawing No. P-23116, dated February 18, 1997 (Project #E12-195-SC), entitled: "Proposed Closing of Carmine St., Bethel St., Ambrose St., Deforrest St., Sussex St. & Magnolia St. (Retaining as a Full Width Utility Easement) in Whitcomb Court (Richmond Redevelopment & Housing Authority)", upon certain terms and conditions.

Patron – City Manager (*By Request*)

Approved as to form and legality
by the City Attorney

PUBLIC HEARING JUNE 23, 1997 AT 8 P.M.

THE CITY OF RICHMOND HEREBY ORDAINS:

§ 1. That Carmine Street, Bethel Street, Ambrose Street, Deforrest Street, the 2100-2300 Block of Sussex Street and the 2700-2800 Block of Magnolia Street, in Whitcomb Court, as shown hatched on a plan prepared by the Department of Public works, and designated as DPW Drawing P-23116, dated February 18, 1997 (Project # E12-195-SC), entitled: "Proposed Closing of Carmine St., Bethel St., Ambrose St., Deforrest St., Sussex St. & Magnolia St. (Retaining as a Full Width Utility Easement) in Whitcomb Court. (Richmond Redevelopment & Housing Authority)", a copy of said drawing being attached to this ordinance, be and are hereby closed to public use and travel and abandoned as streets of the City of Richmond, such streets being no longer needed for the public convenience.

§ 2. This ordinance, as to the closing of the streets identified above, shall be in force as provided in Section 4.09 of the Charter of the City of Richmond and shall become effective when, within twelve months from the day this ordinance is in force (a) consent to the closing is obtained from each of the owners of land, buildings or structures from whom consent is required under Section 25-132 of the Code of the City of Richmond, 1993, which consents shall be in writing, approved as to form by the City Attorney, and filed in the office of the City Clerk; (b) the applicant makes arrangements satisfactory to public and/or private utilities or public service corporations whose properties or facilities are in said streets for either the removal, relocation or abandonment thereof or for the construction, reconstruction, maintenance and repair thereof, evidence of which shall be in writing, approved as to form by the City Attorney, and filed in the office of the City Clerk; (c) applicant bears all cost involved, including, but not limited to, removal, relocation and/or realignment of utilities, installment of new utilities, new or revised street name signs, etc. as directed by City Agencies, and agrees in writing with the City that for itself, its successors and assigns, it will indemnify, reimburse, keep and hold the City free and harmless from liability on account of injury or damage to persons, firms or corporations or

property which may result directly or indirectly from the closing of the streets to public use and travel by this ordinance and the construction or interference with the flow or overflow of surface or subsurface water resulting directly or indirectly therefrom; and in the event that any suit or proceeding is brought against the city at law or in equity, either independently or jointly with the owner or owners of all the property abutting the aforesaid streets, or any of them, on account thereof, to defend the city in any such suit or proceeding at its costs; and in the event of a final judgment or decree being obtained against the City, either independently or jointly with the property owner or owners granting consent for the aforesaid streets to be closed to public use and travel, or any of them, to pay such judgment or comply with such decree including payment of all costs and expenses of whatsoever nature and hold the City harmless therefrom; (d) that eighteen foot fire lanes shall be maintained in the closed street for fire and emergency vehicle access; (e) that applicant shall make provisions to give the appearance that the closed street, particularly at the entrances, are no longer public streets and that they are in fact private streets.

§ 3. The City shall retain a full width utility easement in the streets proposed to be closed by this ordinance as shown hatched on the Department of Public Works Drawing No. P-23116, attached hereto.

§ 4. The City shall retain a full width right of way maintenance easement in the streets proposed to be closed by this ordinance.

§ 5. That the aforesaid closed street shall be designated as public highways for law enforcement purposes in accordance with Virginia Code § 46.2-1307.

§ 6. That Richmond Redevelopment & Housing Authority, as applicant, shall be responsible for satisfying all terms and conditions requisite for the closing of the streets and shall provide the Department of Community Development, Division of Permits and Services, the Law Department, and the City Clerk's office with written evidence that all conditions of this ordinance have been satisfied.

§ 7. At such time as this ordinance becomes effective the City shall have no further right, title and interest in said streets other than expressly retained under provisions of this ordinance or as shown on the attached drawing or granted to satisfy terms and conditions set out in this ordinance.

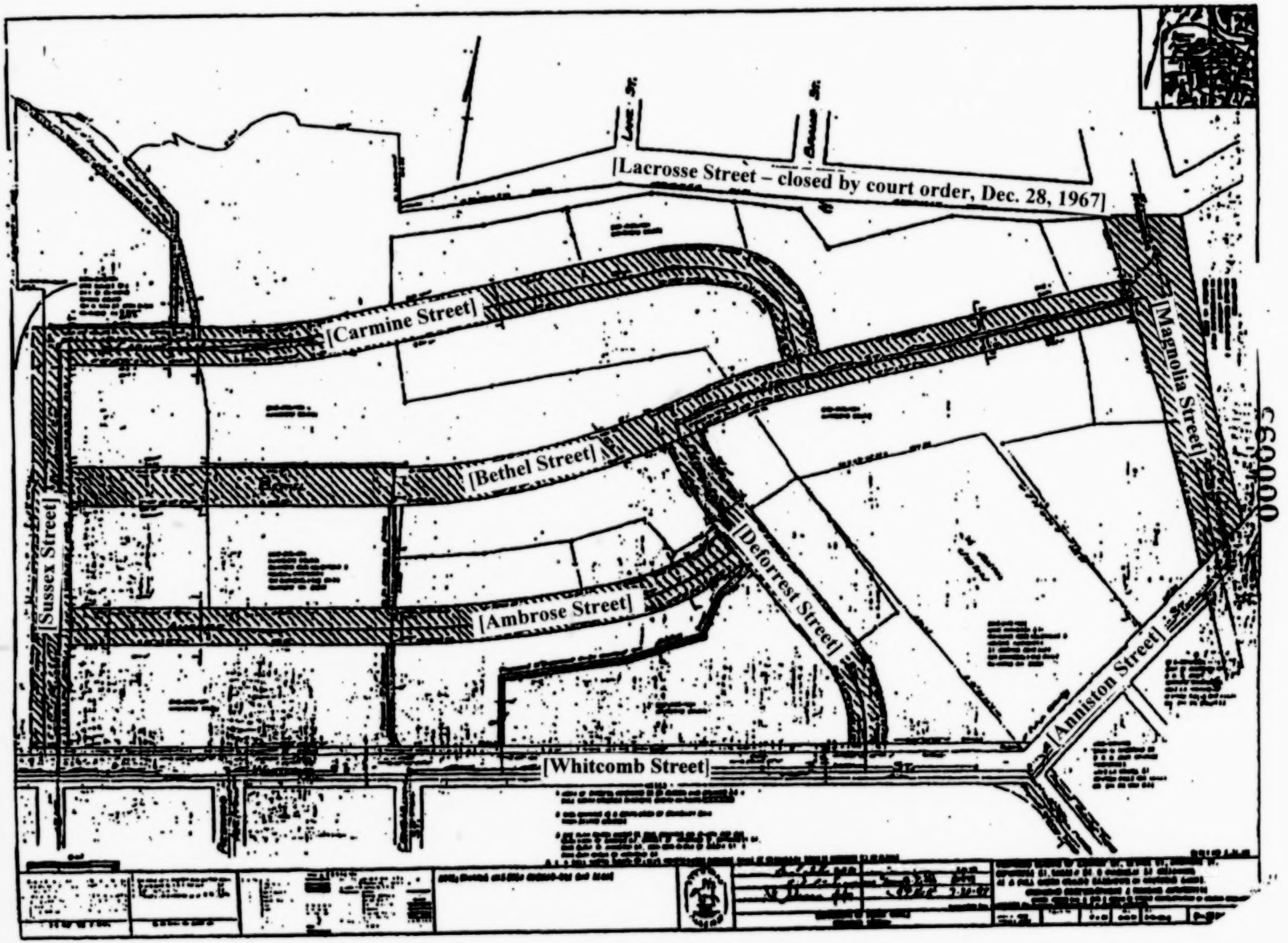
§ 8. This ordinance shall be in force and effect upon satisfaction of the terms and supersede Ordinance No. 97-143-124, adopted May 12, 1997.

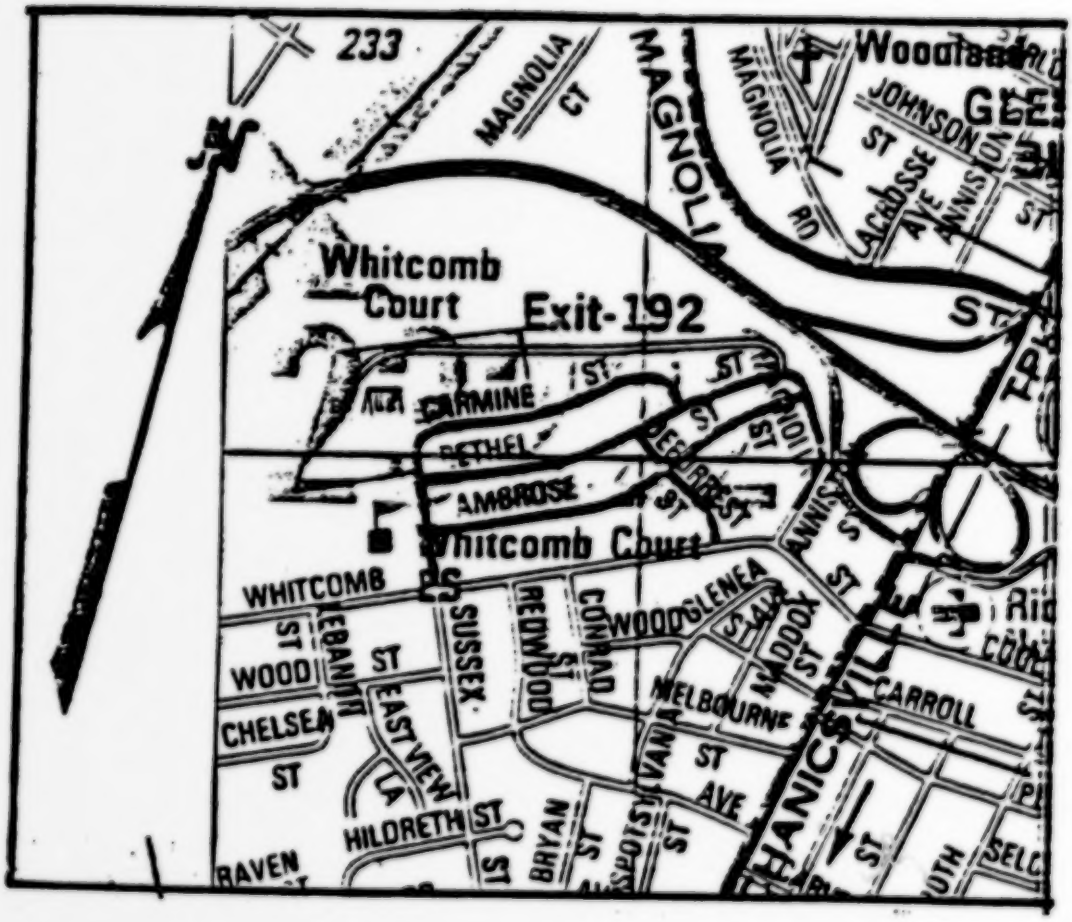
THE CITY OF RICHMOND HEREBY FURTHER ORDAINS:

§ 9. That the aforesaid closed streets are hereby designated as highways for law-enforcement purposes in accordance with Virginia Code § 46.2-1307.

A TRUE COPY:
TESTE:
/s/ Edna Keys-Chavis
CITY CLERK

BEST AVAILABLE COPY





[Enlargement of Inset Map from Plan of Whitcomb Court, Attached to City of Richmond Ordinance No. 97-181-197]

97-16975

THIS DEED, made this 25 day of July, 1997, by and between the City of Richmond, a municipal corporation of the Commonwealth of Virginia ("Grantor") and Richmond Redevelopment & Housing Authority ("Grantee").

RECITAL

This conveyance is exempt from Virginia Grantor's tax pursuant to Section 58.1-811 (C)(3) of the Code of Virginia (1950), as amended.

WITNESSETH

WHEREAS, on June 23, 1997, the City Counsel of the City of Richmond adopted Ordinance NO. 97-181-197 authorizing the closing of Carmine Street, Bethel Street, Ambrose Street, Deforrest Street, the 2100-2300 block of Sussex Street and the 2700-2800 block of Magnolia Street in Whitcomb Court, as shown cross-hatched on a plan prepared by the Department of Public Works dated February 18, 1997, designated DPW Drawing No.: P-23116 (Project No.: E12-195-SC); upon satisfaction of all terms and conditions of such ordinance; and

WHEREAS, the terms and conditions of Ordinance NO. 97-181-197 having been fully satisfied, the Grantor desires and intends to quitclaim its rights in the closed portion of the streets to Grantee;

NOW, THEREFORE, in consideration of the foregoing and the parties mutual best interests, the Grantor hereby remises, releases and forever quitclaims to Grantee all right, title and interest in the following described property:

SEE EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF

PROVIDED, HOWEVER, that the Grantor retains a full width utility easement in the entire parcel conveyed herein; and that the aforesaid closed streets shall be designated as public highways for law enforcement purposes in accordance with Virginia Code Section 46.2-1307; and that eighteen foot fire lanes shall be maintained in the closed streets for fire and emergency vehicle access; and that applicant shall make provisions to give the appearance that the closed streets, particularly at the entrances, are no longer public streets and that they are in fact private streets; and that the City shall retain a full width right of way maintenance easement in the streets closed by ordinance No. 97-180-197.

This conveyance is made subject to easements, conditions and restrictions of record, as the same may lawfully apply to the Property herein conveyed.

IN WITNESS WHEREOF, the Grantor has caused this Deed to be executed on its behalf by its duly authorized representative.

CITY OF RICHMOND

BY /s/ Robert C. Bobb
Robert C. Bobb
City Manager

Approved as to form:

/s/ Jan T. Reid
Jan T. Reid
Assistant City Attorney

COMMONWEALTH OF VIRGINIA
CITY OF RICHMOND, to-wit:

The foregoing Deed was acknowledged before me on this 25th day of July, 1997, by Robert C. Bobb, City Manager of the City of Richmond, on behalf of the Grantor.

/s/ Daphine Stephenson
Notary Public

My commission expires: 8/31/99

GRANTEE'S ADDRESS:

Richmond Redevelopment and
Housing Authority
901 Chamberlayne Parkway
Richmond, VA 23220

[Plan Attached to Deed Is Identical to Plan Attached to Ordinance. See J.A. 79 and 80]

AUTHORIZATION

Richmond Redevelopment and Housing Authority hereby authorizes each and every sworn officer of the Richmond Police Department to enforce the trespass laws of the Commonwealth of Virginia as stated in Virginia Code § 18.2-119 upon Richmond Redevelopment and Housing Authority public housing property. Said property is that property located at and commonly known as: Gilpin Court, Fairfield Court, Whitcomb Court, Creighton Court, Mosby Court, Blackwell Scattered Sites, Hillside Court, Fulton (a.k.a. Rainbow Village), Dove Court, Afton Apartments, Fay Towers, Randolph Place, 1920 Stonewall Avenue, 1200 Decatur Avenue, 3900 Old Brook Circle, 18-A W. 27th Street, 2700 Ildewood Avenue, 700 S. Lombardy Street, 1611 Fourth Avenue.

Richmond Redevelopment and Housing Authority further authorizes each and every Richmond Police Department officer to serve notice, either orally or in writing, to any person who is found on Richmond Redevelopment and Housing Authority property when such person is not a resident, employee, or such person cannot demonstrate a legitimate business or social purpose for being on the premises. Such notice shall forbid the person from returning to the property. Finally, Richmond Redevelopment and Housing Authority authorizes Richmond Police Department officers to arrest any person for trespassing after such person, having been duly notified, either stays upon

or returns to Richmond Redevelopment and Housing Authority property.

RICHMOND REDEVELOPMENT AND
HOUSING AUTHORITY:

By: /s/ T.P. Curtis
T.P. Curtis, Director of Housing Operations

[Notarial Certificate Omitted In Printing]

[Information Provided to Residents Concerning Street Privatization and the No-Trespass Policy]

Richmond Redevelopment and Housing Authority

What you should know

about

Street Privatization

Some answers to most often asked questions.

[LOGO]
REDEVELOPMENT & HOUSING AUTHORITY

RRHA, through an initiative sponsored by the city administration and with the approval of the Richmond City Council, is privatizing streets in public housing communities. ***THIS MEANS:***

- ✓ ***Selected streets are now RRHA property.***
- ✓ ***Unauthorized persons (any person who has been barred by RRHA from the development, or cannot demonstrate that they are on the development visiting a lawfully residing resident, or on the development conducting legitimate business, will be considered unauthorized) are considered trespassers and will be prosecuted as such.***
- ✓ ***Police and the housing authority can now take action against unauthorized persons who in the past would step off of the curb to prevent arrest for trespassing.***

The goal of street privatization is:

- To make communities safer by removing persons who commit unlawful acts which destroy the peaceful enjoyment of other residents.
- To ensure that children have places to play free of drug paraphernalia and the danger of gunshots and other criminal activity.
- To provide an opportunity for residents to develop safety initiatives in their community, such as resident patrols, social security number property identification, neighborhood watch, etc.
- To hold households who knowingly harbor persons who engage in criminal activity accountable.

[2]

What street privatization DOES NOT MEAN:

- Physical barriers blocking street access. The only markers will be signs at entry points, and throughout the development.
- Disruption to the flow of traffic or services. School buses, delivery trucks, and city service vehicles will be able to drive into the development. RRHA and residents will decide on the need to decal cars on a development by development basis.
- Residents and their legitimate guests are subject to harassment or intimidation.
- RRHA properties are under the control of the federal government.
- Legitimate guests are prohibited from visiting residents.

- Disruption to the normal activity of most residents.
- Drug dealers and buyers can step off the street to prevent police arrest.
- Any change in the enforcement of laws by the police. Reports of violations of the law will continue to be handled in the same manner.

[3]

How can I help?

- Support and explain the idea to your neighbors. Remind relatives, neighbors, and guests that we all must help in making our communities safer. Let them know that privatizing the streets is just one tool to promote safer communities.
- Be willing to accept the minor inconvenience of you and/or your guest ***POSSIBLY*** being questioned by police enforcing the law. Since police are not always able to determine who is a resident, they may, from time to time, have to stop and ask questions. Resident cooperation with the police will help in making the community safer for all residents.
- Work with your tenant council to develop other crime prevention and safety initiatives which support the street privatization effort.
- Provide feedback to housing management and resident services staff on how the effort is going.

[4]

If you have questions, comments, or concerns about privatization or wish to find out further how you can help in this effort, please

Call your
HOUSING MANAGER.

[5]

[LOGO]
REDEVELOPMENT
& HOUSING AUTHORITY

Kevin Hicks
Dear Mr. Hicks:

Re: Trespassing on RRHA property
Kevin Hicks
DOB Jan 26, 1976
SSN 227-29-3730

This letter serves to inform you that effective immediately you are not welcome on Richmond Redevelopment and Housing Authority's Whitcomb Court or any Richmond Redevelopment and Housing Authority property. This letter is an official notice informing you that you are not to trespass on RRHA property. If you are seen or caught on the premises, you will be subject to arrest by the police.

A copy of this notice is on file and another copy will be provided to the Richmond Police Department for their record.

Virginia Code, Section 18.2-119

Trespass After Having Been Forbidden to do So

"If any person without authority of law goes upon or remains upon the lands, buildings, or premises of another, or any part, portion or area thereof, after having been forbidden to do so, either orally or in writing by the owner, lessee, custodian, or other person lawfully in charge thereof, or after having [sic] forbidden to do so by a sign or signs posted . . . on such lands, buildings, premises or portion of area thereof at a place or places where it may be reasonably

seen . . . he and/or she shall be guilty of a Class I Misdemeanor."

Thank you for your cooperation.

Sincerely,

[Hand notation]

/s/ Gloria S. Rogers
Housing Manager

Whitcomb
Development

Hand Delivered
in Court
4/14/98

I, the undersigned, acknowledge receipt of this notice.

/s/ Kevin Hicks
Signature

4-14-98
Date received

/s/ Alfonzo Joyner
Witnessing Officer

4-14-98
Date

[Trial Court's Sentencing Order on Trespass Conviction]

Virginia:

In the Circuit Court of the City of Richmond, John Marshall Courts Building

July 29, 1999

COMMONWEALTH

vs. Appeal for Trespassing M-99-1606
Appeal for Failing To Appear M-99-1608

KEVIN LAMONT HICKS, Defendant.

The defendant this day appeared and was set to the bar in the custody of the Sheriff of this City. He was represented by Attorney Steven Benjamin, retained counsel; and the Commonwealth was represented by Russell McGuire. The defendant consented to having these cases tried simultaneously.

Being arraigned, the defendant pleaded not guilty to trespassing, as charged in Appeal M-99-1606; and he pleaded not guilty to failing to appear in the General District Court, as charged in Appeal M-99-1608, after consultation with counsel. With the consent of the accused, given in person, after consultation with counsel, and the concurrence of the Court and the Attorney representing the Commonwealth, the Court proceeded to hear and determine these cases without a Jury. The witnesses having been sworn, and the Court having heard the evidence for the Commonwealth, the defendant, by counsel, moved the Court to strike the evidence of the Commonwealth as being insufficient for the finding of a judgment of guilty, which motion the Court granted in the case of M-99-1608, and the case of M-99-1608 is hereby dismissed. The

Court having heard the arguments of counsel, finds the defendant guilty as charged in the case of M-99-1606, and ascertains his term of confinement in Jail at Twelve Months.

Whereupon it is the judgment of this Court that the said Kevin Lamont Hicks be confined in Jail for a term of Twelve Months; and that he pay and satisfy a fine of $1,000.00 in the case of M-99-1606. The execution of the said Jail sentence is suspended during the defendant's good behavior for five years; and the payment of said fine is suspended during the defendant's good behavior for five years. The defendant is to pay his costs of Court in the case of M-99-1606.

The defendant was remanded to Jail on another charge.

DOB: 1/21/76

July 29, 1999 ENTER: /s/ Thomas N. Nance
Thomas N. Nance, Judge

Virginia:

In the Circuit Court of the City of Richmond,
John Marshall Courts Building

SENTENCING ORDER

Federal Information Processing
Standards Code: 760

Hearing Date: July 29, 1999
Judge: Thomas N. Nance

COMMONWEALTH OF VIRGINIA

v.

KEVIN LAMONT HICKS, DEFENDANT.

The defendant was this day led to the bar in the custody of the Sheriff of this City. He was represented by **Steven Benjamin,** retained counsel; and the Commonwealth was represented by **Russell McGuire**. The defendant consented to having these cases tried simultaneously.

Being arraigned, the defendant pleaded not guilty to violating the terms of a suspended sentence previously imposed in each case by the General District Court, after consultation with counsel. The defendant waived trial by Jury, and the evidence in each case was previously adopted from the motions hearing held on July 13, 1999. The Court finds that the judge of the General District Court did not abuse his discretion in revoking each of the suspended sentences in the following cases:

CASE NUMBER	OFFENSE DESCRIPTION AND INDICATOR (F/M)	OFFENSE DATE	VA. CODE SECTION
M-99-1605	**Abuse of Discretion**	**2/3/99**	**19.2-306**
M-99-1607	**Abuse of Discretion**	**2/3/99**	**19.2-306**
M-99-1609	**Abuse of Discretion**	**2/3/99**	**19.2-306**

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

The Court **SENTENCES** the defendant to:

Incarceration with the City Jail for the term of: Twelve Months in the case of M-99-1605; Six Months in the case of M-99-1607; and Twelve Months in the case of M-99-1609. The total sentence imposed is **Thirty Months**.

The Court orders that said sentences run **concurrently** upon the following conditions:

Good behavior. The defendant shall keep the peace and be of good behavior.

Costs. The defendant shall pay his costs of Court in these cases.

The defendant was remanded to Jail.

July 29, 1999 ENTER: /s/ Thomas N. Nance
Thomas N. Nance, Judge

DEFENDANT IDENTIFICATION:

Alias: None
SSN: 227-29-3730 DOB: 1/21/76 Sex: Male

SENTENCING SUMMARY:

TOTAL SENTENCE IMPOSED: Thirty Months

TOTAL SENTENCE SUSPENDED: Sentences to run concurrently

[Questions Presented by the Defendant in His Brief on Appeal to the Court of Appeals of Virginia.]

QUESTIONS PRESENTED

1. Did the circuit court err in denying the defendant's motion to remand his cases to the general district court for prosecution by a Commonwealth's Attorney before a different judge or to dismiss the charges against him?

2. Did the trial court err in denying the defendant's motion to dismiss the prosecution against him for violations of the right to due process and the rights to freedom of association, speech, and assembly?

[Errors Assigned by the Commonwealth in Its Petition for Appeal to the Supreme Court of Virginia.]

ASSIGNMENTS OF ERROR

I. **THE COURT OF APPEALS ERRED BY HOLDING THAT HICKS, WHO FAILED TO DIRECTLY CHALLENGE HIS BARMENT BY RRHA, HAD TIMELY RAISED THE ISSUE OF THE CONSTITUTIONALITY OF THE BARMENT TRESPASS PROCEDURE WHEN HE RAISED IT AS A DEFENSE IN HIS CRIMINAL CASE.**

II. **THE COURT OF APPEALS ERRED BY HOLDING THAT THE PRIVATIZED STREETS AND SIDEWALKS IN WHITCOMB COURT CONSTITUTED A PUBLIC FORUM, SUBJECT TO STRICT SCRUTINY FOR CONSTITUTIONAL ANALYSIS.**

III. **THE COURT OF APPEALS ERRED BY HOLDING THAT THE TRESPASS POLICY OF RRHA VIOLATED THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.**

KEVIN LAMONT HICKS v. COMMONWEALTH OF VIRGINIA

Record No. 1895-99-2

COURT OF APPEALS OF VIRGINIA

33 Va. App. 561; 535 S.E.2d 678

October 17, 2000

Steven D. Benjamin (Betty Layne DesPortes; Benjamin & DesPortes, P.C., on briefs), Richmond, for appellant.

Virginia B. Theisen, Assistant Attorney General (Mark L. Earley, Attorney General, on brief), for appellee.

Present: COLEMAN and HUMPHREYS JJ., and OVERTON, Senior Judge.

HUMPHREYS, Judge.

Kevin Lamont Hicks appeals his conviction in a trial de novo appeal to the circuit court (trial court) for trespass. Hicks complains that 1) the trial court erred in denying his motion to remand the case to the general district court with instructions for the matter to be tried before a different judge of that court and for the Commonwealth's Attorney to prosecute the case in that forum; 2) the trial court erred in denying his motion to dismiss the prosecution on the grounds that his due process and First Amendment rights were violated; and 3) the trespassing statute is unconstitutionally vague and overbroad. We disagree and for the reasons that follow, affirm his conviction.

I. Background

Previous to January 20, 1999, Hicks had been convicted of trespassing on the property of Whitcomb Court on February 10, 1998, and June 26, 1998, respectively, and of damaging property there on April 27, 1998.

Whitcomb Court is a housing project owned by the Richmond Redevelopment and Housing Authority ("Authority"). The City of Richmond, by ordinance, deeded certain city streets including the 2300 block of Bethel Street, to the Authority for the express purpose of privatizing and closing them to traffic by non-residents. "No Trespassing" signs were placed at intervals on the privatized streets. The Authority authorized the Richmond Police Department to enforce the trespass statute on its property, including Whitcomb Court. On April 14, 1998, Mrs. Gloria Rogers, housing manager at Whitcomb Court, personally served a written notice on Hicks advising him that he was banned from the Whitcomb Court property. This notice specifically advised Hicks that if he were "seen or caught on the premises, [he would] be subject to arrest by police." Hicks acknowledged receipt by signing a copy of the notice. On two occasions after receiving the notice, Hicks went to Mrs. Rogers and sought permission to come back on the property. He told Mrs. Rogers that his mother lived there. His barment from the property was not lifted.

On January 20, 1999, Officer James Laino observed Hicks walking in the 2300 block of Bethel Street. Officer Laino had personal knowledge that Hicks was barred from the property and had arrested him previously for trespassing. Hicks told Laino that he was there "to bring pampers for his baby." Laino issued Hicks a summons for trespassing.

Hicks was tried in general district court on the trespassing summons on April 21, 1999. Hicks was represented by counsel. No prosecutor was present on behalf of the Commonwealth.

Officer Laino testified and responded to questions by the court and was cross-examined by counsel for Hicks.[1] Hicks then testified on his own behalf. Following direct examination, the court propounded several questions to which counsel for Hicks objected. Counsel for Hicks moved to strike Hicks' "testimony in totality." The court granted this motion. The defendant was convicted in general district court and noted his appeal to the circuit court.

Prior to trial in the circuit court, Hicks filed a motion asking the circuit court to remand the case for a new trial in the general district court before a different judge and with direction to the Commonwealth's Attorney that his office represent the Commonwealth in the new trial. At the hearing on his motion, Hicks asked that, in the alternative to granting his motion to remand, the case be dismissed. The circuit court denied the motion on the grounds that it lacked any authority to grant it.

Also prior to trial, Hicks moved to dismiss the charge on the ground that the Authority's trespass policy violates the federal and state constitutions. At a hearing on this motion, Mrs. Rogers testified as to the trespass policy at

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[1] The transcript of the trial in the general district court identifies the witness as "Officer James Hannah." Although the discrepancy is not fully explained in the record, it appears that this witness was actually the same Officer James Laino who issued the summons and testified in the circuit court.

Whitcomb Court. Through Rogers, a flyer was introduced into evidence which the Authority gave to residents and which described the privatization of the streets in the housing complex. This flyer stated and Rogers confirmed in her testimony that non-residents who have not been barred from the property and who can demonstrate that they have been invited by a resident are not affected by the trespassing policy. Rogers also testified that the open-air drug market in the area was the reason for much of the policy toward trespassers and that it is usually a member of the police department who gives the notice and warning. Mrs. Rogers testified that criminal acts on the premises, including those involving drugs or domestic violence, were grounds for barment. She further testified that the police were authorized to warn non-residents to leave the property if they could not demonstrate that they were invited by a resident and to bar them from returning. Additionally, Mrs. Rogers indicated there was a process for having a barment lifted by submitting a written request through the Authority's director of housing operations. She also testified that any organization that seeks to use a privatized street must get permission first and requests to hold functions or pass out materials on the privatized streets are referred to a "community council." She testified that she had not denied permission to anyone who had sought to pass out flyers on the complex property.

The motion to dismiss on constitutional grounds was denied, and Hicks was subsequently tried de novo in a bench trial and convicted of trespassing.

II. Motion for Remand

Hicks first argues that he was entitled to have his case remanded to the general district court for a new trial before another judge because the judge of that court who presided over the initial trial improperly assumed the role of a prosecutor by "cross-examining" him.

The Supreme Court of Virginia has long held that there is no inherent damage to a fair trial when a judge asks questions of a witness.

> [A] trial judge [may] ask questions of a witness either on his examination in chief or on cross-examination. The practice is common and perfectly permissible. Indeed, there are times when it is his duty to do so. He is not to sit there and see a failure of justice on account of omissions to prove facts plainly within the knowledge of a witness, but the character of his questions should not be such as to disclose bias on his part, or to discredit the truthfulness of the witness. "For the purpose of eliciting evidence which has not otherwise been brought out, it is proper for the judge to put the questions to a witness either on his examination in chief or on his cross-examination, and where anything material has been omitted, it is sometimes his duty to examine a witness."

Mazer v. Commonwealth, 142 Va. 649, 655, 128 S.E. 514, 516 (1925) (citations omitted).

In addition, we have held that "the trial court, in the exercise of its sound discretion, may permit jurors to submit written questions to be asked of a witness." *Williams v. Commonwealth*, 24 Va. App. 577, 582, 484 S.E.2d 153, 155 (1997). We also noted in *Williams* that "[t]he function of a jury is to assure a fair and equitable resolution of

all factual issues. The jury serves as the final arbiter of the facts, 'charged with weighing the evidence, judging the credibility of the witnesses, and reaching a verdict' in the case." *Id.* at 582, 484 S.E.2d at 155. This function belongs no less to the court when serving as the fact finder. We need not determine here whether the general district court judge's questions demonstrated an inappropriate bias or prejudice because the court granted Hicks' motion to strike the questions as well as his answers.

In addition, the remedy provided to any defendant in a criminal case who perceives error on the part of a trial court is to exercise the right to appeal the matter to a higher tribunal. In the context of misdemeanors tried in the district courts, the General Assembly has established a right to a trial *de novo* in the circuit court.[2] A *de novo* hearing means a trial anew. On appeal, a conviction in the district court is annulled, and a new trial is held in the circuit court. *See Ledbetter v. Commonwealth,* 18 Va. App. 805, 447 S.E.2d 250 (1994).

While it would clearly be preferable for the Commonwealth to be represented by counsel in every case in which it is a party, the General Assembly has declined to mandate such representation. Code § 15.2-1627(B) recites the duties of Commonwealth's Attorneys and their assistants.[3]

[2] Code § 16.1-136 provides in pertinent part: "Any appeal taken under the provisions of this chapter shall be heard de novo in the appellate court and shall be tried without formal pleadings in writing; and, . . . the accused shall be entitled to trial by a jury in the same manner as if he had been indicted for the offense in the circuit court."

[3] Code § 15.2-1627(B) provides in pertinent part: "The attorney for the Commonwealth . . . shall have the duties and powers imposed upon him by general law, including the duty of prosecuting all warrants,

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This statute only requires Commonwealth's Attorneys to prosecute felonies and provides that a prosecutor "may in his discretion, prosecute Class 1, 2 and 3 misdemeanors." Clearly, the General Assembly decided as a matter of policy to place the discretion for the representation of the Commonwealth in misdemeanor cases in the hands of the executive branch rather than the judicial branch of government.

Hicks relies on the decision of the Supreme Court of the United States in *Ward v. Village of Monroeville,* 409 U.S. 57, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972), as authority for his argument that a trial *de novo* does not cure errors committed in a lower court. We find his reliance on *Ward* is misplaced. In *Ward*, the Supreme Court addressed a systemic problem of bias inherent in the infrastructure of local mayors' courts. There, mayors of villages sat as judges in the courts, and a major portion of village income was derived from the collection of these fines. In finding that such a scheme violates the due process rights of criminal defendants in the mayors' courts, Justice Brennan noted that the constitutional infirmity was grounded in the separation of powers doctrine.

> Although "the mere union of the executive power and the judicial power in him cannot be said to violate due process of law," the test is whether the mayor's situation is one "which would offer a possible temptation to the average man as a

indictments or informations charging a felony, and he may in his discretion, prosecute Class 1, 2 and 3 misdemeanors, or any other violation, the conviction of which carries a penalty of confinement in jail, or a fine of $ 500 or more, or both . . . "

> judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused." Plainly that "possible temptation" may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court.

Id. at 60, 93 S.Ct. at 83 (citations omitted).

Hicks does not allege, nor do we find, such systemic bias in the procedural structure of the district courts in the Commonwealth. Thus, assuming without deciding that the questions propounded by the general district court judge constituted error, we find that the trial de novo in the circuit court provided an adequate remedy.

III. First Amendment

Hicks asserts that the Authority's trespass policies violate his First Amendment right to freedom of association under the constitutions of the United States and the Commonwealth of Virginia.

Hicks was charged with violating Code § 18.2-119, which provides in pertinent part that "[i]f any person without authority of law goes upon or remains upon the lands, buildings or premises of another, or any portion or area thereof, after having been forbidden to do so . . . [or] after having been forbidden to do so by a sign or signs posted . . . shall be guilty of a Class 1 misdemeanor."

Hicks concedes that he had been forbidden to come onto the Whitcomb Court property and admits he did so notwithstanding his barment. Furthermore, he apparently took no steps to appeal his barment through official

channels of the Authority or the courts. Instead, Hicks argues that, notwithstanding the privatization of the street where he was cited, it was public property constituting a "public forum" under the holding of *Marsh v. Alabama,* 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946). We disagree. First, the Supreme Court of Virginia has specifically held that the trespass statute applies to publicly owned property. *See, e.g., Johnson v. Commonwealth,* 212 Va. 579, 186 S.E.2d 53 (1972); *Jordan v. Commonwealth,* 207 Va. 591, 151 S.E.2d 390 (1966); *Miller v. Harless,* 153 Va. 228, 149 S.E. 619 (1929). In addition, we have held that an alleyway, which has been vacated by municipal ordinance and marked with "No Trespassing" signs, is not "intended for public use." *Miller v. Commonwealth,* 10 Va. App. 472, 475, 393 S.E 2d 431, 433 (1990).

"[T]he extent to which the Government can control access depends on the nature of the relevant forum." *United States v. Kokinda,* 497 U.S. 720, 726, 110 S. Ct. 3115, 3119, 111 L. Ed. 2d 571 (1990). Regulation of a nonpublic forum requires only reasonableness and "not an effort to suppress expression merely because public officials oppose the speaker's view. Indeed, control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Id.* at 730, 110 S.Ct. at 3121-22 (citations omitted).

The Attorney General cites *Daniel v. City of Tampa,* 38 F.3d 546 (11th Cir. 1994), *cert. denied,* 515 U.S. 1132, 115 S. Ct. 2557, 132 L. Ed. 2d 811 (1995). The *Daniel* court considered the constitutionality of a Florida trespass-after-warning statute in the context of the property of the Tampa Housing Authority. There, as here, the stated

rationale for the trespassing enforcement effort was to "provide a safe environment for citizens" in a place often used to sell drugs. *Id.* at 548.

In concluding that the Tampa Housing Authority property was a non-public forum, the *Daniel* court found that the restriction on access was content neutral and reasonable and that Florida's trespass statute was not vague or overbroad. We find the *Daniel* analysis, applying *Kokinda*, to be persuasive. The Authority's trespass policy serves a reasonable purpose and is content neutral. Once a person is barred, the person is subject to arrest if he or she returns to the property. We have previously upheld the delegation of authority by a public housing complex to police officers to bar unauthorized individuals from the property for the purpose of preventing crime, protecting property and preserving the peace. *See Holland v. Commonwealth*, 28 Va. App. 67, 502 S.E.2d 145 (1998).

Hicks also argues that the street privatization and trespassing enforcement policy infringes on his freedom to associate. We have previously noted that, although the First Amendment does not explicitly protect a "right of association," the Supreme Court of the United States has recognized such a right in two circumstances, "intimate association" and "expressive association." *See Collins v. Commonwealth,* 30 Va. App. 443, 517 S.E.2d 277 (1999). Hicks asserts that his right to intimate human relationships is infringed by the Authority's policy. In *Collins*, we held that "the liberty interest in intimate association is rooted in the necessity of affording 'certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State.'" *Id.* at 452, 517 S.E.2d at 281 (quoting *Roberts v. United States Jaycees*,

468 U.S. 609, 618-19, 104 S. Ct. 3244, 3250, 82 L. Ed. 2d 462 (1984)) (emphasis added).

The only evidence in the record of Hicks' "intimate associations" in Whitcomb Court are his statement to Officer Laino that he was "bring[ing] pampers to his baby" and his statement to Mrs. Rogers that his mother lived there. Assuming without deciding that this evidence constitutes a sufficient showing that Hicks' right to association is implicated by the Authority's trespassing policy, we consider whether the policy constitutes an unjustified interference with such intimate familial associations.

As already noted, the policy serves a reasonable public safety purpose. Hicks was not a resident of Whitcomb Court. There is no evidence before us that Hicks was invited to the complex. The trespassing policy contains procedures for a resident to secure permission for a guest to come onto the Authority's property but the record is silent as to any efforts to comply with such procedure. Hicks was previously convicted of repeated criminal acts committed on the property. Any interference in Hicks' right to intimately associate with residents of Whitcomb Court caused by his barment is limited to Authority property which, as already stated, though publicly owned, constitutes a "non-public forum" for First Amendment purposes. We find on these facts that to the extent Hicks' barment from the property interfered with his right to "intimate association" with residents of Whitcomb Court, such interference was reasonable, limited and justified.

IV. Trespass Statute

Finally, Hicks challenges the trespassing statute as unconstitutionally vague and further, that it is unconstitutionally overbroad. We note, however, that while he attacks the statute on these dual grounds, his arguments focus instead on the Authority's policies.

"A penal statute is unconstitutionally void-for-vagueness if it does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Santillo v. Commonwealth*, 30 Va. App. 470, 482, 517 S.E.2d 733, 739 (1999) (citation omitted).

Code § 18.2-119 is by no means complex or difficult for one of ordinary intelligence to comprehend. It punishes those who enter upon or remain upon the property of another after having been forbidden to do so by posted sign or personal admonishment. We do not find this statute unconstitutionally vague, either on its face or as applied to Hicks.

We turn now to Hicks' argument that the trespassing statute is unconstitutionally overbroad.

> A statute may be overbroad if it "is one that is designed to burden or punish activities which are not constitutionally protected, but the statute includes within its scope activities which are protected by the First Amendment." Overbreadth is a doctrine whose reach dissipates when a statute proscribes primarily conduct and not speech. If a penal statute proscribes both conduct and speech, "the overbreadth of the statute must . . . be substantial . . . in relation to the statute's plainly legitimate sweep."

Parker v. Commonwealth, 24 Va. App. 681, 690, 485 S.E.2d 150, 154-55 (1997) (citations omitted).

"[T]here must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court for [the statute] to be facially challenged on overbreadth grounds." *Id.* (citing *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800-01, 104 S. Ct. 2118, 2126, 80 L. Ed. 2d 772 (1984) (citation omitted) (footnote omitted)).

We do not find Code § 18.2-119 to be overbroad. The legitimate purpose of the statute is to punish conduct, not protected speech. It applies only on private or non-public property. The statute requires prior notice be given to those implicated by its reach. We do not find that the statute imposes a substantial burden on constitutionally protected conduct nor do we find any realistic danger that the First Amendment rights of parties not before the court will be significantly compromised.

For all of these reasons, we affirm the decision of the trial court.

Affirmed.

COLEMAN, Judge, concurring, in part, and dissenting, in part.

I concur with Part II of the majority opinion which holds that the circuit court did not err by refusing to remand the case to the general district court. However, I disagree with the majority's holdings that Richmond Redevelopment and Housing Authority's (RRHA's) barment

proceeding and "trespass policy" do not violate the First Amendment and the due process clause of the Fourteenth Amendment of the United States Constitution.

I disagree with the majority's conclusion that the barment procedure and trespass statute, as applied in this case, restrict conduct in a "non-public forum," which consists of private streets and sidewalks of a public housing development. In my opinion, the streets and sidewalks of Whitcomb Court are public property open to travel by the public at large and, as such, are a "traditional public forum." Accordingly, any effort by the City of Richmond to control constitutionally protected conduct in a traditional public forum must pass a strict scrutiny test. In my opinion, because the barment procedure and trespass statute infringed on Hicks' right to move freely and to be present in a "traditional public forum," the barment-trespass proceeding violates the First and Fourteenth Amendments. Accordingly, I dissent from those holdings.

The City of Richmond, in an effort to make certain of its streets "private" property, passed an ordinance which authorized deeding those streets to RRHA. After the streets were deeded to RRHA, "No Trespass" signs were posted throughout Whitcomb Court, stating that the property and streets are private property. However, the streets are not gated, barricaded, or otherwise closed or restricted only to Whitcomb Court traffic. The streets remain open to vehicular traffic and the sidewalks are open to access by the public. RRHA's stated goal for "privatization" of the streets was to make the community safer by removing persons from the housing development who commit unlawful acts, particularly involving drugs and firearms; to provide a better opportunity for residents of the community to develop safety initiatives, such as

resident patrols and neighborhood watch; and to hold residents accountable for knowingly harboring criminals.

Although the Richmond City ordinance and deed conveying the streets and sidewalks to RRHA purport to make them private property, both documents specifically provide that the streets "shall be designated as public highways for law enforcement purposes in accordance with Virginia Code Section 46.2-1307 . . . and that the City shall retain a full width right of way maintenance easement in the streets." After the City executed the "privatization" deed, RRHA's Director of Housing signed a written "authorization" implementing the barment proceedings. The authorization provided that "each and every Richmond Police Department officer [was authorized] to serve notice, either orally or in writing," forbidding any person from returning to the property if such person could not demonstrate that he or she was a resident or employee, or that he or she was there for a legitimate business or social purpose. According to a printed brochure issued by RRHA to the Whitcomb Court residents, "unauthorized persons," who are subject to the barment proceedings, are all non-residents who cannot demonstrate that they are on the premises "visiting a lawfully residing resident, or on the development conducting legitimate business."

The police officer, who decides whether the person is to be barred, determines whether the person is a tenant or is there at the invitation of a tenant, or whether the reason for being there is legitimate. Thereafter, once a person is barred, he or she is subject to being prosecuted for trespass for being on the streets or sidewalks in Whitcomb Court even if the person is subsequently there at the invitation of a tenant or there on legitimate business. Thus, to be barred from Whitcomb Court, one does

not have to be guilty of a crime in Whitcomb Court or to have done anything wrong, but rather, one simply has to fail to fit within the category of people who RRHA has deemed entitled to be on the streets and sidewalks in the public housing development. Once barred, the person who returns is a trespasser without regard to whether, on that subsequent occasion, he or she is there on legitimate business or at the invitation of a Whitcomb Court tenant.

The City is entitled, and is in fact required within constitutional limits, to control its streets and sidewalks so as to make them safe and to control crime thereon. However, it may not, in its endeavor to control crime on the streets, sweep so broadly that it unduly restricts or criminalizes innocent or protected behavior. Because the police officers have such broad discretion in determining whether a person, who was on the streets and sidewalks of the housing development, was there at the invitation of a tenant or was there for a "legitimate" purpose, the officers could, as they did here, bar a person from public property for exercising a constitutionally protected right. Once barred, the person continues to be barred and subject to a trespass conviction, as with Hicks, even though he or she may subsequently be there at the invitation of a tenant or for legitimate purposes. *See generally NAACP v. Alabama*, 377 U.S. 288, 307, 84 S. Ct. 1302, 1313, 12 L. Ed. 2d 325 (1964). The evidence does not indicate that Hicks was initially barred because he had committed any unlawful act in Whitcomb Court.[4] According to the unrefuted avowal

[4] As the majority notes, Hicks was convicted of destroying private property in Whitcomb Court after he had been barred for being there not as a tenant or at the express invitation of a tenant. However, the

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of defense counsel, Hicks was barred from Whitcomb Court because he repeatedly returned there to visit his mother, his aunt, and the mother of his two infant children who live in Whitcomb Court. After being barred, Hicks was given written notice of his barment, for which he signed, from housing manager Gloria Rogers. On the occasion for which Hicks was subsequently charged with the trespass that is the subject of this appeal, he was walking on the sidewalk of the 2300 block of Bethel Street in Whitcomb Court and was purportedly there to see that his child, who lived there with its mother, received diapers.

The question presented in this appeal is whether the barment proceeding adopted by RRHA, which authorizes Richmond City police officers to banish people who do not fit within a narrowly defined group from coming upon the streets and sidewalks in Whitcomb Court, and the trespass statute as used to enforce the barment proceeding, violate the First and Fourteenth Amendments. The critical issue in answering that question is whether the streets and sidewalks are public and, as such, are a "traditional public forum," or whether they are "private" and, thereby, a "non-public forum."

> The constitutionality of government regulation of its own property depends upon the character of the property at issue. For purposes of First Amendment analysis, the Supreme Court has identified three types of government-owned property: the traditional public forum, the designated forum, and the nonpublic forum. A traditional

conviction for destroying private property was irrelevant to the barment proceeding or to Hicks' trespass conviction.

> public forum, such as a street or park, is one that has as "a principal purpose . . . the free exchange of ideas." A designated forum is one which the government intentionally opens to the public for expressive activity.
>
> Government limitations on expressive activity in traditional public fora and designated public fora are subject to strict scrutiny; they must be narrowly tailored to serve a compelling state interest. By contrast "[a] nonpublic forum is 'public property which is not by tradition or designation a forum for public communication,'" and limits on access to such need only be reasonable. . . .

Daniel v. City of Tampa, 38 F.3d 546, 549 (11th Cir. 1994) (citations omitted).

Although the grounds and buildings of a public housing development are a "non-public forum" designed to provide safe housing for its residents, *see id.* at 550, the public streets and sidewalks in Whitcomb Court are not private and do not lose their character as a "traditional public forum" merely because the City passes an ordinance and executes a deed declaring them to be private property. The streets and sidewalks have not been gated, barricaded, or closed in a manner restricting public travel. Although the "No Trespassing" street signs declare that the streets are for the exclusive use of the tenants and those there on legitimate business, the streets and sidewalks continue to serve the same function as before and are equally accessible to the travelling public.

We have previously approved a process by which police officers may be designated as agents of a housing authority to serve barment notices on persons trespassing on housing authority property, *see Collins v. Commonwealth*, 30

Va. App. 443, 449, 517 S.E.2d 277, 280 (1999); *Holland v. Commonwealth*, 28 Va. App. 67, 70-76, 502 S.E.2d 145, 146-49 (1998). In *Collins*, we further held that the barment notices prohibiting non-residents from coming upon housing authority property do not violate the "right of association" protected by the First Amendment or the due process clause of the Fourteenth Amendment. *See Collins*, 30 Va. App. at 450-53, 517 S.E.2d at 280-82. However, what distinguishes this case from those, in my opinion, is that Hicks was found guilty of trespass for having gone upon Bethel Street and the adjacent sidewalk, whereas in both *Holland* and *Collins*, the defendants were on the non-public grounds and in the buildings of the housing authority.

The majority relies upon the holding in *Daniel*, 38 F.3d 546, for its conclusion that the "trespass after warning" restriction the housing authority had placed upon access to a "non-public forum" was reasonable. In my opinion, Richmond City Ordinance No. 97-181-197, which authorizes deeding certain city streets to RRHA in an effort to "privatize" the streets in Whitcomb Court and make them subject to the Commonwealth's trespass statute, Code § 18.2-119, did not make the street any less a public street or thoroughfare and did not make it a "non-public forum," as was the situation in *Daniel*. The Eleventh Circuit held in *Daniel* that the mission of the housing authority was to provide safe housing for residents, not to provide non-residents "a place to disseminate ideas." Thus, the buildings and grounds were considered a non-public forum for purposes of determining the extent to which the government could, consistent with the First Amendment, regulate the public's activity on the property. *See* 38 F.3d at 550. However, the *Daniel* court was careful to point out

that the Tampa "trespass after warning" ordinance did not apply to persons on the "streets and sidewalks surrounding and intersecting" the housing authority property. *See id.* at 548 n.3, 550 n.9.

"A traditional public forum, such as a street or park, is one that has as 'a principal purpose . . . the free exchange of ideas.'" *Id.* at 549 (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800, 105 S. Ct. 3439, 3448, 87 L. Ed. 2d 567 (1985)). Bethel Street is a public street that was built and maintained with public funds to provide access by the public to that part of Richmond. As with all public streets and thoroughfares, historically and traditionally public streets have served as a locale for the free exchange and dissemination of ideas and have served as an area that citizens can freely and lawfully congregate or move about and exchange discourse.

The fact that legal title to the streets is transferred from a municipal government to a government agency which owns and operates a public housing development in no way changes the public nature and character of the streets and sidewalks which provide access to the public to this part of the City. *See Marsh v. Alabama*, 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946) (holding that privately owned streets and sidewalks in a company-owned town which are open to public access are traditional public forums that are circumscribed by First Amendment constitutional guarantees). The City cannot transform the public streets in Whitcomb Court into private or non-public streets by declaring them closed by ordinance and conveying them to another governmental entity when they continue to serve the same public purpose as before.

Thus, the City's and RRHA's effort to control conduct or the lawful freedom of movement on a city street, which is a "traditional public forum," by "privatizing" the street and prohibiting citizens from using the streets and sidewalks must pass a strict scrutiny test. In order for the barment-trespass policy to satisfy the strict scrutiny test, the enforcement procedure must be narrowly tailored to serve a compelling state interest, providing safe housing to the development residents. In my view, the RRHA's privatization effort and barment procedure does not satisfy the requirement that the barment-trespass procedure be narrowly tailored because the procedure (1) infringes on the constitutionally protected right of a person's freedom to "remove from one place to another according to inclination," *Williams v. Fears*, 179 U.S. 270, 274, 21 S. Ct. 128, 129, 45 L. Ed. 186 (1900), and to move freely in a traditional public forum, *see City of Chicago v. Morales*, 527 U.S. 41, 54, 119 S. Ct. 1849, 1858, 144 L. Ed. 2d 67 (1999) (holding "it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is 'a part of our heritage'"), and (2) is not limited to apply only to those persons whose conduct the procedure was intended to curtail. In other words, the sweep of the barment-trespass proceeding is so broad that citizens who do not infringe upon the privacy rights of the residents of Whitcomb Court are deemed guilty of criminal conduct for engaging in constitutionally protected public behavior by merely being upon the public street or sidewalk.

Perhaps, had Bethel Street been gated, barricaded, or physically restricted to traffic where the public was not free to travel, as with gated communities, the street would be considered non-public and not a "traditional public

forum." But, in my opinion, the City can no more "close" the streets in Whitcomb Court and leave them open to the public, thereby purporting to make them a "non-public forum," than it could declare "closed" all streets in Richmond's troubled neighborhoods and residential areas, thereby denying access to all citizens except the residents and their invitees and those having legitimate business in the neighborhoods. Neighborhood streets, such as those in Whitcomb Court, are public streets, paid for and maintained with public funds, for the use and benefit of the public.

While a public entity can restrict the use of public property or buildings to those who are using the property for its intended "non-public" purpose, such as an office building, it cannot restrict public property that is considered a "traditional public forum," such as a street or sidewalk, that is being used in a lawful way and for a lawful purpose that is constitutionally protected. *See United States v. Kokinda*, 497 U.S. 720, 727, 110 S. Ct. 3115, 3120, 111 L. Ed. 2d 571 (1990) (holding that sidewalk in front of post office "constructed solely to provide for the passage of individuals engaged in postal business" is a non-public forum). Here, in effect, the City and RRHA, by attempting to convert the streets and sidewalks to private property, are attempting to confer upon RRHA the same rights as a private property owner who may restrict everyone from coming upon the private property owner's property except the owner's tenants and the tenants' invitees, regardless of whether the invitees had done anything unlawful. In fact, the City's attempt to control access to the streets and sidewalks through the barment-trespass proceeding exceeds the right of a private landowner because under the barment proceeding, once

barred, an invitee of a tenant can no longer lawfully come upon the property.

Accordingly, I would reverse Hicks' trespass conviction, because Richmond's barment-trespass procedure, in an effort to control drugs and criminal activity in and around a public housing development, unconstitutionally infringes upon a citizen's First and Fourteenth Amendment rights to lawfully congregate in a public place.[5]

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[5] Because I would reverse on the failure of the City to establish that the barment-trespass procedure meets the strict scrutiny requirements, I do not address whether the barment-trespass procedure, including notice, opportunity to be heard, and an administrative appeals procedure, satisfies the procedural due process requirements of the Fourteenth Amendment. Because the majority only addresses the vague and overbroad issue as they relate to the trespass statute procedure, I decline to address whether the barment-trespass procedure is vague or overbroad.

**KEVIN LAMONT HICKS v.
COMMONWEALTH OF VIRGINIA**

Record No. 1895-99-2

**COURT OF APPEALS OF VIRGINIA
36 Va. App. 49; 548 S.E.2d 249**

July 3, 2001

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Amicus Curiae: American Civil Liberties Union of Virginia Foundation, Inc. (Rebecca K. Glenberg, on brief), for appellant.

Present: FITZPATRICK, C.J., and BENTON, WILLIS, ELDER, BRAY, ANNUNZIATA, BUMGARDNER, FRANK, HUMPHREYS, CLEMENTS, and AGEE, JJ.

FITZPATRICK, Chief Judge.

On October 17, 2000, a panel of this Court affirmed the trespass conviction of Kevin Lamont Hicks (appellant). *See Hicks v. Commonwealth*, 33 Va. App. 561, 535 S.E.2d 678 (2000). Appellant's petition for rehearing en banc was granted and the mandate of the October 17, 2000 opinion was stayed. *See Hicks v. Commonwealth*, 34 Va. App. 42, 537 S.E.2d 616 (2000). Appellant contends the trial court erred in (1) denying his motion to dismiss the prosecution on the grounds that the barment-trespass procedure violated his First and Fourteenth Amendment rights and (2) denying his motion to remand the case to the general district court for trial before a different judge of that court and require the Commonwealth's Attorney to prosecute

the case. Upon rehearing en banc, we hold that the barment-trespass procedure employed by the City of Richmond in the instant case violates the First and Fourteenth Amendments to the United States Constitution and, thus, we reverse and dismiss the trial court's conviction of appellant. The mandate of the October 17, 2000 opinion is hereby vacated.

I.

Whitcomb Court is a housing project owned by the Richmond Redevelopment and Housing Authority (RRHA). RRHA sought to "privatize" the streets surrounding and adjacent to the Whitcomb Court housing project in an effort to make the community safer.[1] On June 23, 1997 the City of Richmond adopted ordinance No. 97-181-197 deeding the streets surrounding Whitcomb Court to RRHA. The ordinance provided:

> § 1. That Carmine Street, Bethel Street, Ambrose Street, Deforrest Street, the 2100-2300 Block of

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[1] RRHA issued a brochure to the residents explaining the goals of street privatization:

> To make communities safer by removing persons who commit unlawful acts which destroy the peaceful enjoyment of other residents
>
> To ensure that children have places to play free of drug paraphernalia and the danger of gunshots and other criminal activity. To provide an opportunity for residents to develop safety initiatives in their community, such as resident patrols, social security number property identification, neighborhood watch, etc.
>
> To hold households who knowingly harbor persons who engage in criminal activity accountable.

Sussex Street and the 2700-2800 Block of Magnolia Street in Whitcomb Court . . . be and are hereby closed to public use and travel and abandoned as streets of the City of Richmond.

* * *

§ 3. The City shall retain a full width utility easement in the streets proposed to be closed by this ordinance . . . .

§ 4. The City shall retain a full width right of way maintenance easement in the streets proposed to be closed by this ordinance.

§ 5. That the aforesaid streets shall be designated as public highways for law enforcement purposes . . . .

The streets deeded to Whitcomb Court at issue here were those streets surrounding and adjacent to the property owned by RRHA, not those contained within Whitcomb Court. Prior to "privatization," these streets were similar to all other streets in Richmond. After the streets were deeded to RRHA, red and white "private property, no trespass" signs were posted throughout Whitcomb Court and every "hundred feet on each block," informing the public that "these streets are privatized and all the property is privatized, no trespass." The signs were "approximately 18 inches to almost 24 inches by about 12 inches." However, the streets were not gated, barricaded, or otherwise closed or restricted only to Whitcomb Court traffic. The streets remained open to vehicular traffic, and the sidewalks were open to access by the public.

After the streets were deeded to RRHA, RRHA adopted a barment-trespass procedure to prevent any "unauthorized persons" from entering the property. On

November 13, 1998 the RRHA's Director of Housing Operations authorized

> each and every sworn officer of the Richmond Police Department to enforce the trespass laws of the Commonwealth of Virginia . . . [upon RRHA property known as] Whitcomb Court. . . . [E]ach and every Richmond Police Department officer [is authorized] to serve notice, either orally or in writing, to any person [found on RRHA property] when such person is not a resident, employee, or such person cannot demonstrate a legitimate business or social purpose for being on the premises.

According to a printed brochure issued by RRHA to the Whitcomb Court residents, "unauthorized persons," who are subject to the barment proceedings, are all nonresidents who cannot demonstrate that they are on the premises "visiting a lawfully residing resident, or on the development conducting legitimate business."

The police officer makes the determination whether a person is to be barred, determines whether the person is a tenant or is there at the invitation of a tenant, or whether there is a legitimate reason for being on the property. A person simply has to fail to fit within the category of people whom RRHA has deemed entitled to be on the streets and sidewalks adjacent to the public housing development to be barred. Once barred, the person who returns is a trespasser without regard to whether, on that subsequent occasion, he or she is there on legitimate business or at the invitation of a Whitcomb Court tenant.

Hicks was convicted of trespassing on the property of Whitcomb Court on February 10, 1998 and June 26, 1998, respectively, and of damaging property in Whitcomb Court

on April 27, 1998.[2] On April 14, 1998, Mrs. Gloria Rogers, the housing manager at Whitcomb Court, served a written notice on Hicks advising him that he was banned from the Whitcomb Court property. He was "not to trespass on RRHA property," and if he was "seen or caught on the premises, [he would] be subject to arrest by the police." Hicks' mother, his baby, and his baby's mother live at Whitcomb Court. After receiving the notice, Hicks twice returned to Whitcomb Court to speak with Mrs. Rogers to seek permission to come back on the property. His requests were denied. On January 20, 1999, Officer James Laino (Laino) observed Hicks walking westbound in the 2300 block of Bethel Street, one of the "privatized" streets adjacent to Whitcomb Court. Laino knew that Hicks was barred from the property. Hicks explained to Laino that he was on the property "bringing pampers to his baby." During the conversation, a female came out and approached Laino and Hicks. Hicks indicated he was visiting her. Laino issued Hicks a summons for trespassing.

Hicks was tried in the general district court without the presence of a Commonwealth's attorney. The district court judge conducted the questioning of Hicks. Hicks objected to this procedure. The judge struck Hicks' testimony at the end of the trial and convicted him. Hicks noted an appeal to the circuit court.

Prior to trial in the circuit court, Hicks filed a motion requesting a remand to the general district court for a new trial and an order requiring a Commonwealth's attorney to

[2] Appellant's barment from Whitcomb Court is not related to his damaging property at Whitcomb Court.

be present and to represent the Commonwealth at this new general district court trial. The circuit court denied the motion on the ground that it lacked authority to remand the trial. Hicks also moved to dismiss the charge of trespass on the ground that the RRHA's trespass policy violated the First and Fourteenth Amendments to the United States Constitution. The circuit court denied his motion to dismiss and found Hicks guilty of trespass.

II. CONSTITUTIONALITY OF RICHMOND ORDINANCE

Appellant argues that Richmond City Ordinance No. 97-181-197 and the RRHA barment-trespass procedure violate the First and Fourteenth Amendments of the United States Constitution.[3] Thus, we must determine whether the First and Fourteenth Amendments are violated by the trespass statute as enforced under authority granted by RRHA to Richmond City police officers to bar people on the streets surrounding and adjacent to

[3] The Commonwealth argues that appellant is barred from contesting the validity of the barment-trespass procedure because he did not present a defense to his presence on RRHA property or challenge his original barment notice or the barment-trespass procedure itself prior to being charged with trespass on January 20, 1999. Therefore the Commonwealth argues that he is improperly collaterally attacking his conviction. We disagree. Prior to his trial for this trespass charge, appellant challenged the barment-trespass procedure as unconstitutional. At trial, appellant's defense to the trespass charge was that the barment-trespass procedure violated his constitutional rights and, thus, he could not be guilty of trespass because he had a constitutional right to be walking on Bethel Street. Thus, we find that appellant timely raised the issue of the validity of the barment-trespass procedure.

Whitcomb Court and who do not fit within a narrowly defined group of people. The critical issue is whether the "privatized" streets and sidewalks are public and as such are a "traditional public forum," or whether they are "private" and, thereby, a "nonpublic forum." If they are "traditional public forum," then the barment-trespass procedure must satisfy the strict scrutiny requirement that the procedure be narrowly tailored to serve a compelling state interest. *See Daniel v. City of Tampa*, 38 F.3d 546 (11th Cir. 1994).

A. "PUBLIC FORUM"

The constitutionality of government regulation of First Amendment rights is analyzed under a public fora analysis. *See Warren v. Fairfax County*, 196 F.3d 186, 190 (4th Cir. 1999).

The public forum analysis was created to recognize that the government must be able to limit the use of its property to the intended purpose for which the property was created and to limit access to those rightfully conducting business there. Toward that end, the Court has identified at least three types of fora for First Amendment purposes, each subject to a different regime of constitutional scrutiny: the traditional public forum, the designated public forum, and the nonpublic forum. The Court distinguishes between these fora based upon the physical characteristics of the property, including its location, the objective use and purposes of the property and government intent and policy with respect to the property, which may be evidenced by its historic and traditional treatment.

Id. at 190-91 (internal citations omitted). Public streets and sidewalks are repeatedly referred to as the archetype of a traditional public forum because they "are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property." *United States v. Grace,* 461 U.S. 171, 179, 103 S. Ct. 1702, 1708, 75 L. Ed. 2d 736 (1983).

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Hague v. Committee for Industrial Organization, 307 U.S. 496, 515-16, 59 S. Ct. 954, 964, 83 L. Ed. 1423 (1939).

"Ownership [of streets and sidewalks] does not always mean absolute dominion." *Marsh v. Alabama*, 326 U.S. 501, 506, 66 S.Ct. 276, 278, 90 L. Ed. 265 (1946) (holding that privately owned streets and sidewalks in a company owned town which are built and operated primarily to benefit the public are traditional public forums that are

protected by First Amendment constitutional guarantees). In *Grace*, 461 U.S. 171, 103 S. Ct. 1702, 75 L. Ed. 2d 736, the United States Supreme Court addressed the ability of the government to redefine certain public sidewalks in front of the United States Supreme Court Building as a non-public forum. There was no separation, fence or any other indication to persons entering the sidewalks that served as the perimeter of the Court grounds that they entered a non-public forum. "The sidewalks comprising the outer boundaries of the Court grounds are indistinguishable from any other sidewalks in Washington D.C., and . . . [there is] no reason why they should be treated any differently." *Id.* at 179, 103 S.Ct. at 1702. The Court held that:

> "Congress[, no more than a suburban township,] may not by its own *ipse dixit* destroy the 'public forum' status of streets and parks which have historically been public forums. . . . " The inclusion of the public sidewalks within the scope of § 13k's prohibition, however, results in the destruction of public forum status that is at least presumptively impermissible. Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression. Nor may the government transform the character of the property by the expedient of including it within the statutory definition of what might be considered a non-public forum parcel of property.

Id. at 180 (quoting *U.S. Postal Service v. Greenburgh Civic Ass'ns*, 453 U.S. 114, 133, 101 S. Ct. 2676, 2687, 69 L. Ed. 2d 517 (1981) (quotation altered to reflect original wording).

As in *Grace*, the streets surrounding Whitcomb Court deeded to RRHA were not separated in any manner from the other streets and sidewalks in the area. The sole indication to the public that they have entered a "private" street are "red and white signs . . . approximately 18 inches to almost 24 inches by about 12 inches . . . spaced about every hundred feet on each block" and on each building indicating that "these streets are privatized and all the property is privatized, no trespass." There is no indication to the public until after they enter onto the "privatized" streets that the streets are any different from the rest of the streets in the city and are now private property. Some of the "privatized" streets are "private" for only a couple of blocks and are public on both ends of the "privatized" blocks. Thus, although the street signs declare the streets "private" and for the exclusive use of residents and those persons there on legitimate business, the streets and sidewalks continue to serve the same functions and are equally accessible to the public as before the City of Richmond passed the ordinance "privatizing" the streets.

Once a person has entered a "privatized" street he or she is subject to the barment-trespass procedure. A trespasser who receives a warning is informed that he or she is "not to trespass upon RRHA property" or "Whitcomb Court." However, the warning does not inform the person that the streets and sidewalks surrounding the complex are a part of RRHA property.

Because the streets appear no different from other streets in Richmond and serve the same function they did prior to "privatization," "we can discern no reason why they should be treated any differently" from any other street or sidewalk. *Grace*, 461 U.S. at 179, 103 S.Ct. 1708. The City of Richmond is not permitted to transform the

public streets and sidewalks in Whitcomb Court into private, non-public property simply by passing an ordinance declaring them closed, conveying them to another governmental entity, the RRHA, and placing signs along the streets. *See Marsh*, 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265; *Grace*, 461 U.S. 171, 103 S. Ct. 1702, 75 L. Ed. 2d 736. Thus, the streets and sidewalks surrounding Whitcomb Court did not lose their public forum status when the City of Richmond deeded them to the RRHA and put some signs on the street indicating they were now private property. Hence, the barment-trespass procedure must satisfy the rigors of strict scrutiny to pass constitutional muster.

The Commonwealth argues that our prior decisions in *Collins v. Commonwealth*, 30 Va. App. 443, 517 S.E.2d 277 (1999), and *Holland v. Commonwealth*, 28 Va. App. 67, 502 S.E.2d 145 (1998), allow housing authorities to restrict access to their property and designate police officers to serve barment notices and arrest persons trespassing on housing authority property. We have previously approved a process by which police officers may be designated as agents of a housing authority to serve barment notices on persons trespassing on housing authority property, *see Collins*, 30 Va. App. at 449, 517 S.E.2d at 280; *Holland*, 28 Va. App. at 70-76, 502 S.E.2d at 146-49. However, what distinguishes this case from those is that Hicks was found guilty of trespass for having gone upon Bethel Street and the adjacent sidewalk, whereas in both *Holland* and *Collins*, the defendants were on the non-public grounds and in the buildings of the housing authority.

The Commonwealth also contends that we should follow the Eleventh Circuit's decision in *Daniel*, 38 F.3d 546. The *Daniel* court authorized a housing authority to

enforce a no trespassing policy identical to the one at issue in the instant case. However, unlike the instant case, in *Daniel*, "the City-owned streets and sidewalks surrounding and intersecting with the Housing Authority property [were] open to the public" and *Daniel* had "unlimited access to the City-owned streets and sidewalks adjacent to the housing complex." *Id.* at 548 n.3 & 550; *see also Walker v. Georgetown Hous. Auth.*, 424 Mass. 671, 677 N.E.2d 1125, 1128 (Mass. 1997) (calling into question the reasoning of the *Daniel* court and the applicability of the ruling to streets and sidewalks that were kept "open to the public"). Thus, in *Daniel*, the no trespassing policy was limited to the non-public forum consisting of the housing authority's buildings and grounds and did not include the adjacent streets and sidewalks as the RRHA policy does in the instant case. Bethel Street is a public street that was built and maintained with public funds to provide access by the public to that part of Richmond. As with all public streets and thoroughfares, historically and traditionally public streets have served as a locale for the free exchange and dissemination of ideas and have served as an area where citizens can freely and lawfully congregate or move about and exchange discourse.

The fact that legal title to the streets is transferred from a municipal government to a government agency which owns and operates a public housing development does not change the public nature and character of the streets and sidewalks which provide access to the public to this part of the City. *See Marsh*, 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265. The City cannot transform the public streets surrounding Whitcomb Court into non-public streets by declaring them closed by ordinance and conveying them

to another governmental entity when they continue to serve the same public purpose as before.

B. "STRICT SCRUTINY"

Therefore, the City of Richmond's and RRHA's attempt to control access to and movement upon the streets and sidewalks of the city is "subject to strict scrutiny; [it] must be narrowly tailored to serve [the] compelling state interest" of providing safe housing to the development's residents. *Daniel*, 38 F.3d at 549. The stated goal of the RRHA barment-trespass procedure is to ensure a safe environment free from criminal activity for the residents of Whitcomb Court. We agree that the City of Richmond has a compelling interest in protecting its citizens and preventing criminal activity. However, it may not, in its endeavor to control crime, pass and enforce a regulation so broad in scope that it unduly restricts or criminalizes innocent constitutionally protected behavior.

The barment-trespass procedure used in this case inhibits a person's constitutionally protected "'right to remove from one place to another according to inclination'" and the person's right to "remain in a public place of his choice." *Chicago v. Morales*, 527 U.S. 41, 53, 54, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999) (quoting *Williams v. Fears*, 179 U.S. 270, 274, 21 S. Ct 128, 129, 45 L. Ed. 186 (1900)). In *Morales*, the United States Supreme Court held that a city ordinance designed to reduce crime by criminalizing "loitering" violates the Constitution. The Court stated that "it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is 'a part of our heritage' or the right to move 'to

whatsoever place one's own inclination may direct'" and the ordinance "broadly covers a significant amount" of activity that is constitutionally protected. *Id.* at 53-54, 119 S. Ct. at 1849 (internal citations omitted). The City of Richmond and RRHA barment-trespass procedure also prevents a person from standing upon the streets surrounding Whitcomb Court without a "legitimate reason." Thus, it implicates the same concerns addressed in *Morales*.

The barment-trespass procedure is not limited so as to encompass only those persons whose conduct the City and RRHA were seeking to curtail. The procedure is so broad that citizens who merely drive or walk upon one of the "privatized" streets fall within the defined group of people not authorized by the barment procedure to be upon the streets and sidewalks and, thus, may be deemed guilty of criminal conduct. A citizen need not commit a crime, intend to commit a crime or infringe upon the privacy of the residents of Whitcomb Court to be in violation of the barment-trespass statute and ordinance. The Commonwealth presented no evidence that appellant did anything other than exercise his constitutionally protected right to walk upon the streets and sidewalks of the City of Richmond. Perhaps, had Bethel Street been gated, barricaded, or physically restricted to traffic where the public was not free to travel, as with gated communities, the street could be considered non-public and not a "traditional public forum." But the City can no more "close" the streets in Whitcomb Court and leave them open to the public, thereby purporting to make them a "non-public forum," than it could declare "closed" all streets in Richmond's troubled neighborhoods and residential areas, thereby denying access to all citizens except the residents and

their invitees and others specifically approved. Neighborhood streets, such as those in Whitcomb Court, are public streets, paid for and maintained with public funds, for the use and benefit of the public.

While a public entity can restrict the use of public property or buildings to those who are using the property for its intended "non-public" purpose, such as an office building, it cannot restrict public property that is considered a "traditional public forum," such as a street or sidewalk, that is being used in a lawful way and for a lawful purpose that is constitutionally protected. *See United States v. Kokinda*, 497 U.S. 720, 727, 110 S. Ct. 3115, 3120, 111 L. Ed. 2d 571 (1990) (holding that sidewalk in front of a post office "constructed solely to provide for the passage of individuals engaged in postal business" is a non-public forum). Here, in effect, the City and RRHA, by converting the streets and sidewalks to private property, attempted to confer upon RRHA the same rights as a private property owner who may restrict everyone from coming upon the private property owner's property except the owner's tenants and the tenants' invitees, regardless of whether the invitees had done anything unlawful. However, the United States Supreme Court has held that even a private entity which owns the entire town cannot close the streets to deny the public their constitutional rights. *See Marsh*, 326 U.S. at 506, 66 S. Ct. at 276. Therefore, the barment-trespass procedure at issue here is not narrowly tailored to encompass only those activities the RRHA sought to exclude from their property.

III. CONCLUSION

Thus, we hold that Richmond's barment-trespass procedure, when strictly scrutinized, is not narrowly tailored to serve the government's compelling interest, the standard that must be met when the government attempts to regulate activity in a "traditional public forum."[4] The RRHA's privatization effort unconstitutionally infringes upon a citizen's First and Fourteenth Amendment rights to lawfully be present in a public place. Accordingly, we hold that city ordinance No. 91-181-197 [sic] as enforced through the barment-trespass procedure is unconstitutional and we reverse and dismiss appellant's conviction.[5]

Reversed and dismissed in part, reversed and remanded in part.

HUMPHREYS, Judge, with whom WILLIS, BRAY, BUMGARDNER and AGEE, JJ., join, dissenting.

I. Constitutional Issues

I must respectfully dissent from the majority opinion, which holds that the Richmond Redevelopment and

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[4] In his petition for appeal, appellant also requested this Court to set aside the order revoking his suspended sentences on his two prior convictions for trespassing at Whitcomb Court and his prior conviction for damaging property at Whitcomb Court. However, appellant did not pursue this on brief or in oral argument. Therefore, we remand this case to the circuit court to reconsider the revocation of his suspended sentences in light of our holding in this opinion.

[5] Because we reverse on the failure of the City of Richmond to establish the constitutionality of the barment-trespass procedure, we do not address appellant's arguments regarding errors in the general district court proceedings or whether the barment-trespass procedure violated the procedural due process requirements of the Fourteenth Amendment.

Housing Authority's (RRHA) barment proceeding and trespass policy violate the First and Fourteenth Amendments of the United States Constitution.

First, I do not agree that Hicks properly raised his objections to RRHA's barment procedures. Hicks concedes that the RRHA provided him with a barment notice on April 14, 1998. This barment notice was issued to Hicks pursuant to a valid ordinance adopted by the City of Richmond, both requiring and authorizing RRHA to take any necessary steps to "give the appearance that the closed streets . . . are no longer public streets and that they are in fact private streets." The notice, which Hicks signed in acknowledgment of its receipt, specifically prohibited Hicks from entering onto RRHA premises for any reason.

Subsequently, on at least one occasion, Hicks approached the housing manager for the Whitcomb Court property, Gloria Rogers, to request that he be able to visit his mother, a resident of that property. Rogers denied his request and again informed him that he was barred from entering the property pursuant to the barment notice. However, other than speaking to Rogers, Hicks took no steps to appeal his barment through official channels of the Authority or the courts. Instead, he ignored the barment and was arrested and convicted for trespassing, as well as for damaging property in Whitcomb Court, prior to his arrest for the incident of January 20, 1999. In addition, for this prior trespass conviction, Hicks received a suspended sentence on the court-ordered condition that he

keep the peace and be of good behavior for three years. However, Hicks continued to ignore the barment notice, as well as the court order, and trespassed again on January 20, 1999. Now, for the first time, in connection with his conviction for the January 20, 1999 trespass, Hicks argues that the barment violated his constitutional rights under the First and Fourteenth Amendments.

Hicks' arguments in this regard represent an untimely and improper collateral attack on his barment status. We have held, in the context of an habitual offender adjudication, that where a defendant has knowledge of an underlying order, never appeals the order, and subsequently violates the order, he cannot attack the underlying order in the new proceeding. *See Morgan v. Commonwealth*, 28 Va. App. 645, 507 S.E.2d 665 (1998). We based our decision in *Morgan* on *Mays v. Harris*, 523 F.2d 1258 (4th Cir. 1975), wherein the Fourth Circuit Court of Appeals held that an habitual offender who failed to appeal the underlying conviction, could not, with impunity, choose to ignore the adjudication and resulting injunction "for, . . . 'in the fair administration of justice, no man can be judge in his own case.'" *Id.* at 1259 (quoting *Walker v. Birmingham*, 388 U.S. 307, 321, 87 S. Ct. 1824, 1832, 18 L. Ed. 2d 1210 (1967) (holding that a party can be held in contempt of court for violating an injunction, even if the injunction was invalid under the Federal Constitution)).

I believe the principle advanced in *Walker, Mays* and *Morgan* is equally applicable to this case. Here, Hicks was barred from the property pursuant to authority granted RRHA by ordinance which, in turn, provided an administrative procedure for contesting such barment. Hicks had knowledge of his barment from the property, he had been previously convicted of trespassing on the property prior to

his trial for the trespassing incident of January 20, 1999, and in conjunction with that conviction, he had been ordered by the court to maintain good behavior for three years. Despite the opportunity presented by the prior court proceedings, as well as the availability of an administrative appellate procedure, Hicks raised no objection to the propriety of the barment until his trial for the January 20, 1999 incident. Pursuant to the principles set forth in the above-cited cases, I do not believe Hicks should be allowed to have bypassed "orderly judicial review of [the barment and his prior trespassing convictions] before disobeying [them]." *Walker*, 388 U.S. at 320, 87 S. Ct. at 1824.

I would also reject Hicks' challenges to the constitutionality of RRHA's policy. "In assessing the constitutionality of a statute or ordinance, courts must presume that the legislative action is valid. Consequently, the burden is on the challenger to demonstrate the constitutional defect." *Coleman v. City of Richmond*, 5 Va. App. 459, 462, 364 S.E.2d 239, 241 (1988). I would hold that Hicks failed to meet this burden.

Hicks essentially argues, on brief and orally, that because the streets of Whitcomb Court were once public streets and sidewalks owned by the City of Richmond, any statute restricting his presence thereon is unconstitutionally overbroad or vague. Hicks further alleges that because the policy is overbroad and vague, it impinges upon his First Amendment guarantees of free speech and implied guarantee of free association, as well as his Fourteenth Amendment due process protections.

"[G]enerally, a litigant may challenge the constitutionality of a law only as it applies to him or her." *Id.* at

463, 364 S.E.2d at 241. "The traditional rule is that a person to whom a [policy] may be constitutionally applied may not challenge that [policy] on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York v. Ferber*, 458 U.S. 747, 769, 102 S. Ct. 3348, 3360, 73 L. Ed. 2d 1113, (1982). Yet,

> [w]hat has come to be known as the First Amendment overbreadth doctrine is one of the few exceptions to this principle and must be justified by weighty countervailing policies. The doctrine is predicated on the sensitive nature of protected expression . . . [and] [i]t is for this reason that we have allowed persons to attack overly broad statutes even though the conduct of the person making the attack is clearly unprotected and could be proscribed by a law drawn with the requisite specificity.

Id. The United States Supreme Court has also allowed a facial attack on the grounds of vagueness even though the litigant's own speech was unprotected. *See Kolender v. Lawson*, 461 U.S. 352, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983).

Nevertheless, "where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the [policy's] plainly legitimate sweep." *Ferber*, 458 U.S. at 770, 102 S. Ct. at 3348. This distinction is ignored by the majority. "We have never held that a [policy] should be invalid on its face merely because it is possible to conceive of a single impermissible application . . . ." *Id.* at 771, 102 S. Ct. at 3348. Instead, "[i]n a facial challenge to the overbreadth and vagueness of a law, a court's first task is

to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Houston v. Hill*, 482 U.S. 451, 458, 107 S. Ct. 2502, 2508, 96 L. Ed. 2d 398 (1987).

A policy will be deemed unconstitutionally overbroad if it is "one that is designed to burden or punish activities which are not constitutionally protected, but the [policy] includes within its scope activities which are protected by the First Amendment." *Parker v. Commonwealth*, 24 Va. App. 681, 690, 485 S.E.2d 150, 154-55 (1997). A policy will be deemed unconstitutionally vague if "it does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Santillo v. Commonwealth*, 30 Va. App. 470, 482, 517 S.E.2d 733, 739 (1999) (citation omitted).

It is axiomatic that in making such a determination, an appellate court should refrain from speculation outside of the record before it. Here, contrary to Hicks' argument, the policy clearly does not bar individuals from freely associating with their friends or loved ones living on RRHA property, nor does it prohibit persons from exercising free expression. Further, the policy does not automatically delineate every non-resident who uses a sidewalk owned by RRHA to be a trespasser, as suggested by the majority. Instead, it merely authorizes the Richmond police, as agents of the RRHA, to ban persons from the property who enter upon the property without permission

from a resident or the RRHA. Significantly, any unauthorized individuals are not automatically arrested, but they are warned that they are not to enter the property in the future.[6] Further, those who have been formally banned from the property are not without recourse and can request, through the proper RRHA channels, to have the ban removed.

Thus, I would consider this policy as a "paradigmatic case of [one] whose legitimate reach dwarfs its arguably impermissible applications." *Ferber*, 458 U.S. at 773. Under these circumstances, I would find that the policy is not "substantially overbroad" and/or vague and that "whatever overbreadth [or vagueness] may exist should be cured through a case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16, 93 S. Ct. 2908, 2918, 37 L. Ed. 2d 830 (1973).

The majority has found that the Whitcomb Court property is a traditional public forum simply because the property in question is a sidewalk adjoining a street constructed and once owned by the City of Richmond. However, neither the evidence in this record nor the precedents of the United States Supreme Court compel such a finding. I agree that "the Supreme Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of

[6] Contrary to the majority's statement otherwise, Hicks presented no evidence suggesting that the warning does not inform persons that the streets and sidewalks surrounding the complex are part of RRHA property.

those wishing to use the property for other purposes. Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum." *Paff v. Kaltenbach*, 204 F.3d 425, 431 (3rd Cir. 2000) (citing *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 800, 105 S. Ct. 3439, 3448, 87 L. Ed. 2d 567 (1985)). However, "when the relevant public property is determined to be a 'non-public forum,' rather than an 'open forum' or a 'designated forum,' the government has greater freedom to restrict speech." *Id.*

A traditional public forum is property which has the physical characteristics of a public thoroughfare, which has the objective use and purpose of open public access or some other objective use and purpose inherently compatible with expressive conduct, and by which history and tradition has been used for expressive conduct. *See Warren v. Fairfax County*, 169 F.3d 190, 198 (4th Cir. 1999) (Murnaghan, J., dissenting), *adopted and incorporated by reference by the majority in Warren v. Fairfax County*, 196 F.3d 186, 191 (4th Cir. 1999) (*en banc*). As the majority also correctly points out, a sidewalk adjoining a public street will generally fall into this category. *See Frisby v. Schultz*, 487 U.S. 474, 481, 108 S. Ct. 2495, 2500-01 (1988). However, the sidewalk at issue here is not the "quintessential" public sidewalk which has been "immemorially held in trust for the use of the public," or which has been traditionally "used for public assembly and debate, the hallmarks of a traditional public forum." *See Frisby*, 487 U.S. at 480-81; *see also United States v. Grace*, 461 U.S. 171, 179-80, 103 S. Ct. 1702, 1709, 75 L. Ed. 2d 736 (1983) (instructing that it is incorrect to assert that every "public sidewalk" is a public forum).

While it is true that the City of Richmond cannot transform public streets and sidewalks into private, non-public property simply by passing an ordinance declaring them private or closed property, this is but one factor to consider in determining the nature of the sidewalks at issue. *See Marsh v. Alabama*, 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946); *see also United States v. Kokinda*, 497 U.S. 720, 727, 110 S. Ct. 3115, 3120, 111 L. Ed. 2d 571 (1990). Moreover, contrary to the majority's conclusion, "[t]he mere physical characteristics of the property cannot dictate forum analysis." *Kokinda*, 497 U.S. at 727, 110 S. Ct. at 3115. Instead, we must also consider the location and purpose of the sidewalk, in order to determine its character as public or private. *See id.* at 728-29, 110 S. Ct. at 3115.

I agree with the majority that a "critical issue" is also whether the privatized streets continue in their previous character as a traditional public forum. However, contrary to the majority, I would find that neither the purpose, the treatment, nor the physical characteristics of the Whitcomb Court sidewalks support the majority's conclusion that they fall within the parameters of a traditional public forum.

First, the Whitcomb Court property, including its streets and sidewalks, has been deeded from the City to the RRHA. Although ignored by the majority, a condition for the closure of the streets by the City required RRHA to "make provisions to give the appearance that the closed streets, particularly at the entrances, [were] no longer public streets and that they [were] in fact, private streets." In order to meet this requirement, although the streets and sidewalks of the development were not physically barricaded, RRHA posted red and white signs, "approximately 18 inches

to almost 24 inches by about 12 inches" in size, on each side of the buildings, as well as on the streets of the property, on each block, about every 100 feet. These signs clearly indicated that the streets and sidewalks had been privatized and that trespassing was prohibited.[7] The record further indicates that RRHA held meetings with residents and provided pamphlets explaining the privatization. The pamphlet encouraged residents to explain the privatization to their neighbors and guests in order to facilitate the change. Finally, for at least a year prior to Hicks' present arrest, RRHA and the Richmond police treated the property as private property by determining whether visitors were authorized and by banning unauthorized persons from the property.

In concluding that "there is no indication to the public until after they enter onto the 'privatized' streets that [they] are any different from the rest of the streets in the city," the majority both improperly assumes a fact-finding function outside the record in this case and improperly shifts the burden of proof concerning the character of the forum away from Hicks. A review of the character of the "privatized" streets and sidewalks, restricted to the record of the trial court, reveals that other than exceptions for school buses, delivery trucks, city service vehicles and law enforcement, there is absolutely no evidence that the streets and/or sidewalks of the Whitcomb Court property remained open to a public flow of traffic, as the majority

[7] Officer Llaino [sic] testified to the size, number and location of the signs and that the substance of the message on the signs was that "all the property had been privatized and that trespass[ing was] prohibited." This evidence was uncontradicted.

suggests. Furthermore, even though sidewalks "may be open to the public, [that] fact alone does not establish that such areas must be treated as traditional public fora under the First Amendment." *Kokinda*, 497 U.S. at 729, 110 S. Ct. at 3115.

Thus, given the clear intent by the City of Richmond to remove the streets of Whitcomb Court from the category of thoroughfares available for use by the general public and given the notice to the residents and the public at large in the form of repeated and obvious signage that the streets and sidewalks were no longer "public" in character, I would hold that the restrictions imposed by RRHA must be analyzed under the test for non-public property: they must be reasonable and "not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* at 730 (citing *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46, 103 S. Ct. 948, 955, 74 L. Ed. 2d 794 (1983)).

There is no dispute here that the stated purpose for RRHA's trespassing enforcement effort, which was to "provide a safe environment for citizens in a place often used to sell drugs," is reasonable and legitimate. In fact, we have previously upheld the delegation of authority by a public housing complex to police officers to bar unauthorized individuals from the property for the purpose of preventing crime, protecting property and preserving the peace. *See Holland v. Commonwealth*, 28 Va. App. 67, 502 S.E.2d 145 (1998).

Moreover, as stated above, the record is clear that a person is not considered "unauthorized" until he or she has entered the property without the permission of either

a resident or an RRHA official. Even then, and notwithstanding numerous and obvious signs that acquaint anyone able to read that the character of the property is private and not public, unless the individual is engaged in some type of criminal activity, that individual is not formally barred from the property until after he or she has been warned not to enter the property without permission. Once an individual is barred from the property, a procedure is available to request removal of the barment. Further, Hicks produced no evidence that either RRHA or the Richmond police have ever banned any form of expression based on its content.

Based on this record, I would find that any potential interference with an individual's right of expression and/or intimate association with residents of Whitcomb Court, or to "loiter" on the property, which, although publicly owned, in my judgment constitutes a "non-public forum" for First Amendment purposes, is reasonable, limited and justified to achieve the legitimate purpose of protecting these residents from crime. Therefore, I would hold that Hicks' conduct at the time of his arrest - namely, knowingly trespassing on private property - was not constitutionally protected.

II. Motion to Remand

Because I would hold that RRHA's barment proceeding and trespass policy with respect to Hicks do not violate the First and Fourteenth Amendments, I would address the remaining assignment of error.

Hicks argues that he was entitled to have his case remanded to the general district court for a new trial before another judge because the judge of that court who

presided over the initial trial improperly assumed the role of a prosecutor by "cross-examining" him.

The Supreme Court of Virginia has long held that there is no inherent damage to a fair trial when a judge asks questions of a witness.

> [A] trial judge [may] ask questions of a witness either on his examination in chief or on cross-examination. The practice is common and perfectly permissible. Indeed, there are times when it is his duty to do so. He is not to sit there and see a failure of justice on account of omissions to prove facts plainly within the knowledge of a witness, but the character of his questions should not be such as to disclose bias on his part, or to discredit the truthfulness of the witness. "For the purpose of eliciting evidence which has not otherwise been brought out, it is proper for the judge to put the questions to a witness either on his examination in chief or on his cross-examination, and where anything material has been omitted, it is sometimes his duty to examine a witness."

Mazer v. Commonwealth, 142 Va. 649, 655, 128 S.E. 514, 516 (1925) (citations omitted).

In addition, we have held that "the trial court, in the exercise of its sound discretion, may permit jurors to submit written questions to be asked of a witness." *Williams v. Commonwealth*, 24 Va. App. 577, 582, 484 S.E.2d 153, 155 (1997). We also noted in *Williams* that "the function of a jury is to assure a fair and equitable resolution of all factual issues. The jury serves as the final arbiter of the facts, 'charged with weighing the evidence, judging the credibility of the witnesses, and reaching a verdict' in the case." *Id.* at 582, 484 S.E.2d at 155. This

function belongs no less to the court when serving as the fact finder. We need not determine here whether the general district court judge's questions demonstrated an inappropriate bias or prejudice because the court granted Hicks' motion to strike the questions as well as his answers.

In addition, the remedy provided to any defendant in a criminal case who perceives error on the part of a trial court is to exercise the right to appeal the matter to a higher tribunal. In the context of misdemeanors tried in the district courts, the General Assembly has established a right to a trial de novo in the circuit court.[8] A de novo hearing means a trial anew. On appeal, a conviction in the district court is annulled, and a new trial is held in the circuit court. *See Ledbetter v. Commonwealth*, 18 Va. App. 805, 447 S.E.2d 250 (1994).

While it would clearly be preferable and in its interest for the Commonwealth to be represented by counsel in every case in which it is a party, the General Assembly has declined to mandate such representation. Code § 15.2-1627(B) recites the duties of Commonwealth's Attorneys and their assistants.[9] This statute only requires Commonwealth's

[8] Code § 16.1-136 provides in pertinent part: "Any appeal taken under the provisions of this chapter shall be heard de novo in the appellate court and shall be tried without formal pleadings in writing; and, . . . the accused shall be entitled to trial by a jury in the same manner as if he had been indicted for the offense in the circuit court."

[9] Code § 15.2-1627(B) provides in pertinent part: "The attorney for the Commonwealth . . . shall have the duties and powers imposed upon him by general law, including the duty of prosecuting all warrants, indictments or informations charging a felony, and he may in his discretion, prosecute Class 1, 2 and 3 misdemeanors, or any other

(Continued on following page)

Attorneys to prosecute felonies and provides that a prosecutor "may in his discretion, prosecute Class 1, 2 and 3 misdemeanors." Thus, the General Assembly decided as a matter of policy to place the discretion for the representation of the Commonwealth in misdemeanor cases in the hands of the executive branch rather than the judicial branch of government.

Hicks relies on the decision of the Supreme Court of the United States in *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972), as authority for his argument that a trial de novo does not cure errors committed in a lower court. I find his reliance on *Ward* is misplaced. In *Ward*, the Supreme Court addressed a systemic problem of bias inherent in the infrastructure of local mayors' courts. There, mayors of villages sat as judges in the courts, and a major portion of village income was derived from the collection of these fines. In finding that such a scheme violates the due process rights of criminal defendants in the mayors' courts, Justice Brennan noted that the constitutional infirmity was grounded in the separation of powers doctrine.

> Although "the mere union of the executive power and the judicial power in him cannot be said to violate due process of law," the test is whether the mayor's situation is one "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him

violation, the conviction of which carries a penalty of confinement in jail, or a fine of $ 500 or more, or both . . . ."

> not to hold the balance nice, clear and true between the State and the accused." Plainly that "possible temptation" may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court.

Id. at 60, 93 S. Ct. at 80 (citations omitted).

Hicks does not allege, nor do I find, such systemic bias in the procedural structure of the district courts in the Commonwealth. Thus, assuming without deciding that the questions propounded by the general district court judge constituted error, I would hold that the trial de novo in the circuit court provided an adequate remedy.

For all of these reasons, I dissent and would affirm the judgment of the trial court.

COMMONWEALTH OF VIRGINIA
v.
KEVIN LAMONT HICKS
Record No. 011728
SUPREME COURT OF VIRGINIA
264 Va. 48; 563 S.E.2d 674
June 7, 2002

Present: All the Justices

Virginia B. Theisen, Assistant Attorney General (Randolph A. Beales/Jerry W. Kilgore, Attorney General, on briefs), for appellant.

Steven D. Benjamin (Betty Layne DesPortes; Benjamin & DesPortes, on brief), for appellee.

Amicus Curiae: City of Richmond and Richmond Redevelopment and Housing Authority (John A. Rupp, City Attorney; Norman B. Sales, Senior Assistant City Attorney; William G. Broaddus; Johnathan T. Blank; William H. Baxter, II; Godfrey T. Pinn, Jr.; McGuireWoods, on brief), in support of appellant.

Amicus Curiae: American Civil Liberties Union of Virginia, Inc. (Rebecca K. Glenberg, on brief), in support of appellee.

JUSTICE HASSELL delivered the opinion of the Court.

The narrow issue that we consider in this appeal is whether a redevelopment and housing authority's trespass policy is overly broad and thereby violates the First and Fourteenth Amendments to the Constitution of the United States.

I.

Kevin Lamont Hicks was charged with trespass in violation of Code § 18.2-119 and three violations of the conditions of suspended sentences imposed upon him for prior trespass convictions. He was tried and convicted in the City of Richmond General District Court.

Hicks appealed the convictions to the Circuit Court of the City of Richmond, and he filed a motion to dismiss the charges against him on the basis that a redevelopment and housing authority's trespass policy contravened the First and Fourteenth Amendments to the Constitution of the United States. The circuit court denied the motion. At the conclusion of a bench trial, Hicks was convicted of trespass and sentenced to 12 months in jail, which was suspended. The circuit court also revoked Hicks' prior suspended sentences.

Hicks appealed the judgment to the Court of Appeals. A panel of the Court of Appeals affirmed the judgment, *Hicks v. Commonwealth,* 33 Va. App. 561, 535 S.E.2d 678 (2000), but the Court of Appeals *en banc* disagreed with the panel and vacated Hicks' conviction because the redevelopment and housing authority's trespass policy contravened the First and Fourteenth Amendments to the Constitution of the United States. *Hicks v. Commonwealth*, 36 Va. App. 49, 52, 548 S.E.2d 249, 251 (2001). The Commonwealth appeals.

II.

The Richmond Redevelopment and Housing Authority (Housing Authority) is a political subdivision of the Commonwealth of Virginia. The Housing Authority owns and operates a housing development in the City of Richmond

for low income residents known as Whitcomb Court. The City of Richmond owned the streets located within Whitcomb Court.

In an effort to eradicate illegal drug activity in Whitcomb Court, which was described as an "open-air drug market," the Housing Authority sought to deny access to its property to persons who did not have legitimate reasons to visit the housing development. The majority of persons who had been arrested for drug crimes at the Whitcomb Court housing development were individuals who did not reside there.

The Richmond City Council enacted an ordinance that "closed to public use and travel and abandoned as streets of the City of Richmond," streets in Whitcomb Court because those streets were "no longer needed for the public convenience." The City conveyed the streets by a recorded deed to the Housing Authority.

The deed required that the Housing Authority "make provisions to give the appearance that the closed streets, particularly at the entrances, are no longer public streets and that they are in fact private streets." The Housing Authority's employees affixed red and white signs to each apartment building in Whitcomb Court. The signs are also located "every 100 feet" along the streets in Whitcomb Court and are "approximately 18 inches to almost 24 inches by about 12 inches" in size. The signs state:

"NO TRESPASSING

"PRIVATE PROPERTY

"YOU ARE NOW ENTERING
PRIVATE PROPERTY AND
STREETS OWNED
BY RRHA.

"UNAUTHORIZED PERSONS
WILL BE SUBJECT TO
ARREST AND PROSECUTION.

"UNAUTHORIZED
VEHICLES WILL BE TOWED
AT OWNERS EXPENSE."

The Housing Authority, in its capacity as owner of the private streets, authorized

> "each and every Richmond Police Department officer to serve notice, either orally or in writing, to any person who is found on Richmond Redevelopment and Housing Authority property when such person is not a resident, employee, or such person cannot demonstrate a legitimate business or social purpose for being on the premises. Such notice shall forbid the person from returning to the property. Finally, Richmond Redevelopment and Housing Authority authorizes Richmond Police Department officers to arrest any person for trespassing after such person, having been duly notified, either stays upon or returns to Richmond Redevelopment and Housing Authority property."

As a part of the Housing Authority's unwritten policies, Gloria S. Rogers, the Housing Authority's housing manager for Whitcomb Court, was required to determine whether a person can demonstrate a legitimate business or social purpose to use the Housing Authority's property. Pursuant to these policies, individuals who sought access to the Housing Authority's property, including the streets,

needed to obtain Rogers' permission for such access. Rogers stated that if a person desired to disseminate materials or participate in an activity on the property, that person must obtain her authorization. Sometimes, she referred such request to a "community council" which met with "the Board and the residents." She also testified that if an individual submitted a request to distribute flyers and the request was not "routine," she referred that request to the Housing Authority's director of housing operations for resolution. The Housing Authority, however, has not promulgated any written policies or procedures that govern decisions regarding who may distribute materials or participate in activities on the Housing Authority's property.

Pursuant to the Housing Authority's unwritten policies, an individual who is not authorized to use the Housing Authority's property and does so is warned by the Richmond Police Department. The Housing Authority forwards a letter to that individual informing him that he may not lawfully return to the property.

On January 20, 1999, Richmond police officer James J. Laino, who was driving a police car on Bethel Street, observed Hicks, who was walking on a sidewalk on that street. Bethel Street is one of the streets that the City conveyed to the Housing Authority and that street is located entirely within Whitcomb Court.

Laino, who had known Hicks for about four years, approached him. Laino knew that Hicks had been notified that he was barred from the Housing Authority's property. Laino informed Hicks that he was "not supposed to be out here," and Laino issued a summons to Hicks for trespass.

Rogers had also spoken with Hicks on two prior occasions and told him that he could not appear on the Housing Authority's property. Hicks had been arrested on two prior occasions for trespass on the Housing Authority's property. On April 14, 1998, Hicks signed a letter that was hand delivered to him by Rogers. The letter, which the parties describe as a barment notice, states in part:

> "This letter serves to inform you that effective immediately you are not welcome on Richmond Redevelopment and Housing Authority's Whitcomb Court or any Richmond Redevelopment and Housing Authority property. This letter is an official notice informing you that you are not to trespass on RRHA property. If you are seen or caught on the premises, you will be subject to arrest by the police."

III.

A.

The Commonwealth argues that Hicks is not entitled to challenge the constitutional validity of the Housing Authority's practices or policies in the criminal prosecution for trespass. The Commonwealth contends that Hicks instead was required to challenge the barment notice he received from the Housing Authority or the Housing Authority's policies and practices, presumably in a separate proceeding. We disagree.

In this case, Hicks has asserted a constitutional challenge to a conviction. Hicks pled in a written pretrial motion that the Housing Authority's trespass procedures and policy violated the First Amendment. At trial, Hicks

argued that the Housing Authority's trespass procedures and policy were unconstitutional.

Contrary to the Commonwealth's assertions, Hicks was not required to file a civil proceeding to challenge the Housing Authority's trespass policies and practices. Rather, this defendant was entitled to challenge the validity of his conviction on the basis that the Housing Authority's practices and procedures contravened his constitutional rights. We observe that in other contexts, we have permitted defendants to assert constitutional challenges to convictions in criminal prosecutions, *see, e.g.*, *Remington v. Commonwealth*, 262 Va. 333, 344-45, 551 S.E.2d 620, 628 (2001); *McCain v. Commonwealth*, 261 Va. 483, 489-90, 545 S.E.2d 541, 544-45 (2001); *Lenz v. Commonwealth*, 261 Va. 451, 460-62, 544 S.E.2d 299, 304-05 (2001); *Burns v. Commonwealth*, 261 Va. 307, 321-23, 541 S.E.2d 872, 882-83 (2001); *Pitt v. Commonwealth*, 260 Va. 692, 695-96, 539 S.E.2d 77, 78-79 (2000). We also note that the Supreme Court has permitted criminal defendants to assert constitutional challenges to various ordinances in criminal prosecutions. *See, e.g.*, *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938).

B.

Hicks argued in the Court of Appeals, and he argues here, that the Housing Authority's trespass procedures are overly broad and, therefore, violate fundamental constitutional rights to freedom of speech guaranteed by the First Amendment to the Constitution of the United States. Responding, the Commonwealth contends that the Housing Authority's trespass policy is not overly broad. The Commonwealth also asserts that a defendant who raises a

facial constitutional challenge must demonstrate a substantial risk that the application of the challenged policy will result in suppression of protected speech.

The First Amendment states in part that "Congress shall make no law . . . abridging the freedom of speech." The Supreme Court has stated that this "freedom is among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action; and municipal ordinances adopted under state authority constitute state action." *Staub v. City of Baxley*, 355 U.S. 313, 321 (1958); *accord Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937), *overruled on other grounds*, *Benton v. Maryland*, 395 U.S. 784, 794 (1969); *Stromberg v. California*, 283 U.S. 359, 368 (1931); *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

The Supreme Court has held that in the context of a First Amendment challenge, a litigant may challenge government action granting government officials standardless discretion even if that government action as applied to the litigant is constitutionally permissible. For example, the Supreme Court stated in *Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32, 38 (1999):

> "The traditional rule is that 'a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court.' *New York v. Ferber*, 458 U.S. 747, 767 (1982) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973)).
>
> "Prototypical exceptions to this traditional rule are First Amendment challenges to statutes

> based on First Amendment overbreadth. 'At least when statutes regulate or proscribe speech . . . the transcendent value to all society of constitutionally protected expression is deemed to justify allowing "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity."' *Gooding v. Wilson*, 405 U.S. 518, 520-521 (1972) (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)). 'This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their right for fear of criminal sanctions provided by a statute susceptible of application to protected expression.' *Gooding v. Wilson*, [405 U.S.] at 520-521. See also *Thornhill v. Alabama*, 310 U.S. 88 (1940)."

The Supreme Court has also pointed out that the overbreadth doctrine is "strong medicine" and this doctrine should be employed "sparingly and only as a last resort." *Broadrick*, 413 U.S. at 613.

The Supreme Court has consistently and repeatedly invalidated government policies that facially vested officials with broad and unfettered discretion to regulate speech. *See, e.g.*, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969) (invalidating ordinance requiring marchers to seek permission from mayor); *Kunz v. New York*, 340 U.S. 290, 293-94, 95 L. Ed. 280, 71 S. Ct. 312 (1951) (invalidating ordinance prohibiting public worship without a permit from police commissioner); *Saia v. New York*, 334 U.S. 558, 559-61 (1948) (invalidating ordinance that required operators of sound trucks to obtain permission from police chief).

The Supreme Court stated in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 763-64 (1988):

> "[A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official. We have often and uniformly held that such statutes or policies impose censorship on the public or the press, and hence are unconstitutional, because without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker. *E.g.*, *Cox v. Louisiana*, 379 U.S. [536], 557 [(1965)]; *Staub*, 355 U.S. at 322. Therefore, even if the government may constitutionally impose content-neutral prohibitions on a particular manner of speech, it may not condition that speech on obtaining a license or permit from a government official in that official's boundless discretion. It bears repeating that '[i]n the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether . . . his conduct could be proscribed by a properly drawn statute, and whether . . . he applied for a license.' *Freedman [v. Maryland]*, 380 U.S. [51], 56 [(1965)]."

In *Lakewood*, the Supreme Court applied these principles and invalidated a city ordinance that permitted a mayor to grant or deny a permit to a publisher who desired to place a news rack on a sidewalk. The ordinance placed no limits on the mayor's discretion to grant or deny

the requested permit. The Supreme Court stated that this lack of limitations upon an official's discretion "renders the guarantee against censorship little more than a high sounding ideal." 486 U.S. at 769-70.

In *Staub, supra,* the Supreme Court invalidated an ordinance that permitted a mayor and a city council to grant or deny a permit to a labor union allowing it to solicit members based upon the "effects upon the general welfare of citizens of the City of Baxley." The Court stated:

> "These criteria are without semblance of definitive standards or other controlling guides governing the action of the Mayor and Council in granting or withholding a permit. Cf. *Niemotko v. Maryland*, 340 U.S. 268, 271-273 [(1951)]. It is thus plain that they act in this respect in their uncontrolled discretion.
>
> "It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official – as by requiring a permit or license which may be granted or withheld in the discretion of such official – is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms."

355 U.S. at 322. And, in *Schneider v. State*, 308 U.S. 147, 163-64 (1939), the Supreme Court invalidated a city ordinance that banned "communication of any views or the advocacy of any cause from door to door" without a written permit from the chief of police. The Court held that the ordinance was a restraint upon First Amendment rights and stated that the ordinance "strikes at the very heart of the constitutional guarantees." *Id.* at 164.

We also observe that in *Lovell*, *supra*, the Supreme Court invalidated a city ordinance that prohibited the distribution of circulars, handbooks, advertising, or literature of any kind without first obtaining written permission from the city manager of the City of Griffin. Alma Lovell, who was convicted for violation of this criminal ordinance and sentenced to imprisonment, asserted that the ordinance was facially invalid. The Court observed:

> "We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing.' And the liberty of the press became initially a right to publish '*without* a license what formerly could be published only *with* one.' While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision. . . . Legislation of the type of the ordinance in question would restore the system of license and censorship in its baldest form."

303 U.S. at 451-52 (footnote omitted).

Applying the principles established by the Supreme Court, we hold that the Housing Authority's trespass policy is invalid because it is overly broad and it infringes upon First Amendment protections. Even though the

Housing Authority's trespass policy, which is written in part and unwritten in part, is designed to punish activities that are not protected by the First Amendment, the policy also prohibits speech and conduct that are clearly protected by the First Amendment. Also we note that Hicks is entitled to assert a facial constitutional challenge to the Housing Authority's trespass policy even though a portion of that policy is unwritten. To hold otherwise would permit the government to violate a citizen's First Amendment protections by simply refusing to memorialize unconstitutional policies in a written document. We observe that the United States Supreme Court and the various United States Courts of Appeals have permitted litigants to assert First Amendment facial challenges to unwritten government policies. *See Niemotko v. Maryland*, 340 U.S. at 271-73 (unwritten practice of issuance of licenses to use a public park for meetings); *Wells v. City & County of Denver*, 257 F.3d 1132, 1150-51 (10th Cir.); *cert. denied*, ___ U.S. ___, 122 S. Ct. 469 (2001) (unwritten policy that banned unattended holiday displays); *Lebron v. AMTRAK*, 69 F.3d 650, 659, *amended by* 89 F.3d 39, 39 (2d Cir. 1995) (unwritten policy that banned political advertisements); *Tipton v. University of Hawaii*, 15 F.3d 922, 927-28 (9th Cir. 1994) (unwritten policy "as manifested in the University's application of its written policy"); *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1197-99 (11th Cir. 1991) (unwritten scheme for regulating the placement of newspaper racks).

Rogers, the Housing Authority's housing manager for Whitcomb Court, testified that the Housing Authority has not implemented written procedures or guidelines concerning the enforcement of the trespass policy. The Housing Authority has not implemented any guidelines that

delineate how an individual may obtain permission to use the property. Even though "authorized" persons may use the Housing Authority's property, Rogers, in the exercise of her unfettered discretion, is the government official who determines whether an individual is authorized.

Rogers also has unfettered discretion to determine who can distribute literature at the Whitcomb Court housing development and, pursuant to the Housing Authority's unwritten trespass policy, a non-resident of Whitcomb Court can only distribute such literature if that non-resident obtains authorization from Rogers. Rogers testified that she will permit non-residents to distribute material only if she is "used to seeing" the material. Rogers testified as follows:

> "Question: If an organization wanted to use the privatized street or sidewalk in a housing community in order to hold some sort of demonstration, in order to walk back and forth with signs in support of some sort of political position, would they be permitted on the property if they were nonresidents?
>
> "Answer: They could get permission first. And I would say, again, I need it in writing to see the nature or whatever. They need permission first to be on the property.
>
> "Question: Are you in a position – does your position enable you to tell people – to give people permission to come on and picket or demonstrate on housing community property?
>
> "Answer: I'm not sure what you're asking. To picket? I've had people to call to pass out flyers, and asked to have church services. And these are things I'm used to.

> "As far as picketing and stuff, I never had that so I'm not familiar with it.
>
> "Question: Let's talk about what you're used to.
>
> "Answer: Okay.
>
> "Question: With situations such as those, people wanting to pass out flyers for example, or hold church related meetings, do they have to come to you for permission?
>
> "Answer: Yes.
>
> "Question: Then do you give permission?
>
> "Answer: Depending on the circumstances, sometimes it's granted, yes.
>
> "Question: Sometimes you do and sometimes you don't?
>
> "Answer: Correct."

Based upon the record before this Court, Rogers has the unfettered discretion to determine not only who has a right to speak on the Housing Authority's property, but she may prohibit speech that she finds personally distasteful or offensive even though such speech may be protected by the First Amendment. She may even prohibit speech that is political or religious in nature. However, a citizen's First Amendment rights cannot be predicated upon the unfettered discretion of a government official.

We recognize that the Court of Appeals decided this case on the basis that the Housing Authority's private streets constitute a public forum and that the Housing Authority's efforts to regulate speech in that forum contravene the First Amendment. In view of our limited

holding, we need not resolve this issue and, thus, we will vacate that portion of the judgment of the Court of Appeals, and we will reserve consideration of this issue for another day. Also, we need not, and we do not, express any views regarding the litigants' remaining contentions.

IV.

We will affirm the judgment of the Court of Appeals on the narrow basis that the Housing Authority's trespass policy is overly broad and that Hicks may assert this issue in this criminal prosecution.

Affirmed in part,
vacated in part,
and final judgment.

JUSTICE KINSER, with whom JUSTICE LEMONS joins, concurring in part and dissenting in part.

Today, the majority holds that the trespass policy of the Richmond Redevelopment and Housing Authority (the Authority) is "overly broad and . . . infringes upon First Amendment protections" because the Authority's housing manager, according to the majority, has "unfettered discretion" to determine whether an individual is authorized to be on the Authority's property. The majority reaches this issue by allowing the defendant to make a facial challenge to the Authority's trespass policy. I do not believe that such a challenge is permissible in this case.

A facial challenge to a statute, or in this case, to the trespass policy, can proceed under two different doctrines. "First, the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law

are substantial when 'judged in relation to the statute's plainly legitimate sweep.'" *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). Under the second doctrine, even if a statute is not overbroad (i.e., it "does not reach a substantial amount of constitutionally protected conduct"), "it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." *Id.* (citing *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)).

The majority utilizes the overbreadth doctrine to find the trespass policy unconstitutional on its face. Explaining the defendant's standing, the majority states that, "in the context of a First Amendment challenge, a litigant may challenge government action granting government officials standardless discretion even if that government action as applied to the litigant is constitutionally permissible." The majority intertwines its examination of the standing issue and its substantive analysis of the trespass policy, and in doing so, uses its view that the trespass policy grants unfettered discretion to the housing manager to decide who can come onto the Authority's property to support its conclusion that the defendant has standing to make a facial challenge. In other words, the majority does not separate the question of standing from its substantive First Amendment ruling.

To support this finding of unfettered discretion and thus standing, the majority relies upon a line of cases involving prior restraints upon the exercise of First Amendment rights. Each of the cases cited by the majority addressed a statute requiring a license or permit to engage in First Amendment activity. *See, e.g., City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 769 (1988)

(invalidating ordinance requiring publishers to obtain permit from mayor for placing newsracks on sidewalk); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969) (invalidating ordinance requiring marchers to seek permission from city commission); *Staub v. City of Baxley*, 355 U.S. 313, 321 (1958) (invalidating ordinance requiring labor unions to seek permit from mayor and city council for solicitation of members); *Kunz v. New York*, 340 U.S. 290, 293-94 (1951) (invalidating ordinance prohibiting public worship without permit from police commissioner); *Saia v. New York*, 334 U.S. 558, 560-61 (1948) (invalidating ordinance that required operators of loud-speakers and amplifiers to obtain permission from police chief); *Schneider v. State*, 308 U.S. 147, 162-64 (1939) (invalidating ordinance that banned distribution of literature without written permit from chief of police); *Lovell v. City of Griffin*, 303 U.S. 444, 450-51 (1938) (invalidating ordinance prohibiting distribution of literature without first obtaining written permission from city manager).

Because the Authority's trespass policy does not directly regulate activity protected by the First Amendment, but instead limits access to government property, I conclude that these cases are not persuasive authority to justify the defendant's facial challenge to the trespass policy. In using these cases, the majority also assumes that the trespass policy regulates pure speech instead of conduct. This approach allows a facial challenge in this case without directly addressing the admonition of the Supreme Court of the United States that "overbreadth scrutiny has been limited with respect to conduct-related regulation." *New York v. Ferber*, 458 U.S. 747, 766 (1982) (citing *Broadrick*, 413 U.S. 601).

"The traditional rule is that a person to whom a [policy] may constitutionally be applied may not challenge that [policy] on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *Id.* at 767 (citing *Broadrick*, 413 U.S. at 610). One exception to this principle is in the arena of First Amendment overbreadth. *Id.* at 768. However, "[b]ecause of the wide-reaching effects of striking down a statute[, or trespass policy as in this case,] on its face at the request of one whose own conduct may be punished despite the First Amendment," the First Amendment overbreadth doctrine has been recognized as "strong medicine" and is employed "with hesitation, and then 'only as a last resort.'" *Id.* at 769 (quoting *Broadrick*, 413 U.S. at 613). As explained in *Broadrick*:

> facial overbreadth adjudication is an exception to [the] traditional rules of practice and . . . its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct – even if expressive – falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.

413 U.S. at 615. Thus, the Court has held that "where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Ferber*, 458 U.S. at 770 (quotation marks omitted).

The Authority's trespass policy is found in the "Authorization" given to the Richmond Police Department to enforce the trespass laws of the Commonwealth of Virginia upon the Authority's public housing property. An individual may be banned from the Authority's property if that individual "is not a resident, employee, or such person cannot demonstrate a legitimate business or social purpose for being on the premises." After receiving either written or oral notice that he or she cannot return to the Authority's property, that person may then be arrested for trespass if he or she "either stays upon or returns" to the Authority's property.

By its terms, this policy is directed at conduct, namely trespassing, and not pure speech. *Cf. Cox v. Louisiana*, 379 U.S. 559, 581 (1965) (Black, J., concurring in part and dissenting in part) ("Standing, patrolling, or marching back and forth on streets is conduct, not speech, and as conduct can be regulated or prohibited."); *Local 391 v. City of Rocky Mount*, 672 F.2d 376, 379 (4th Cir. 1982) (picketing is a hybrid of speech and conduct). The policy is not aimed at censoring particular groups or viewpoints, or prohibiting individuals from distributing leaflets on the property. Nor is it intended to prevent individuals from associating with friends or family who live in Whitcomb Court. Instead, it seeks to regulate the criminal act of trespassing that violates Code § 18.2-119. In other words, the policy's legitimate sweep prohibits trespassing, an activity that is not protected by the First Amendment.

Because the trespass policy regulates conduct and not pure speech, I conclude that it must be "substantially overbroad" before it can be attacked through a facial challenge, and that whatever overbreadth may exist in the

policy does not meet the threshold of "substantial overbreadth." "The concept of 'substantial overbreadth' is not readily reduced to an exact definition[, but] . . . the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). Instead, this is "the paradigmatic case of a [policy] whose legitimate reach dwarfs its arguably impermissible applications." *Ferber*, 458 U.S. at 773. "[W]hatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick*, 413 U.S. at 615-16. Thus, I find that the defendant does not have standing to assert a facial challenge to the Authority's trespass policy under the "overbreadth doctrine."

Nor do I believe that the defendant can make a facial challenge to the trespass policy under the "vagueness" doctrine. "A [defendant] who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982); *accord Parker v. Levy*, 417 U.S. 733, 756 (1974); *but see Morales*, 527 U.S. at 55. The defendant's conduct when he was arrested for trespass clearly violated both the trespass policy and Code § 18.2-119. He had been previously banned from Whitcomb Court and had been given written notice that he was not to trespass on the Authority's property. Nevertheless, he entered upon the property on the day in question. There

can be no question that this conduct was clearly proscribed.

Thus, I conclude that the defendant may only challenge the trespass policy as it was applied to him. Before turning to that issue, I am compelled to point out that, if a facial challenge is to be allowed in this case, it should be analyzed under the framework established by the Supreme Court for deciding when an individual's First Amendment rights have been violated by a denial of access to government property. *See United States v. Kokinda*, 497 U.S. 720, 726-27 (1990).

"[T]he [U.S. Supreme] Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 800 (1985). The first inquiry in this analysis is whether the particular activity at issue is speech protected by the First Amendment. *Id.* at 797. If it is, the nature of the forum must then be identified, "because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." *Id.* "[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981). The final inquiry is whether the "justifications for exclusion from the relevant forum satisfy the requisite standard." *Cornelius*, 473 U.S. at 797. The defendant agrees that this analytical framework applies in this case, as reflected by his statement on brief that, "[i]n determining whether [the Authority's trespass policy] is

permissible, this Court must first define the areas affected by the regulation."

Returning to the issue regarding the constitutionality of the trespass policy as applied to the defendant, I find that the only constitutional right that the defendant could have been asserting when he entered upon the Authority's property for the purpose of bringing diapers to his son was his right of association under the Fourteenth Amendment. *See Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987) (constitutional protection afforded to freedom of association in two distinct areas: freedom to enter into and maintain certain intimate or private relationships, and freedom to associate for purpose of engaging in protected speech or religious activities). Although the defendant argues that his conviction for trespassing violated his First Amendment rights of speech and association, and his Fourteenth Amendment right of intimate association, he was not engaged in speech or expressive association on the day in question. Thus, I conclude that the defendant's claim must be analyzed under the Fourteenth Amendment rather than the First Amendment. *See Thompson v. Ashe*, 250 F.3d 399, 406-07 (6th Cir. 2001). Consequently, it is not necessary to engage in a forum analysis, as the Court of Appeals did. As I previously explained, the first step in that analysis is whether the particular activity at issue is speech protected by the First Amendment. *Cornelius*, 473 U.S. at 797. When it is not, as in this case, then it is not necessary to determine the nature of the forum.

In determining whether the Authority's trespass policy impermissibly infringes upon the defendant's freedom of association under the Fourteenth Amendment, it is necessary to decide first whether the defendant's

asserted purpose for being on the Authority's property, i.e., to take diapers to his child, involved the exercise of a fundamental right. The Supreme Court has recognized a fundamental right of privacy that includes the freedom to enter into and maintain certain intimate relationships. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 383-86 (1978) (constitutional protection of marriage); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977) (right to choose whether to bear children); *Moore v. City of East Cleveland*, 431 U.S. 494, 506 (1977) (right to cohabitate with certain family members); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (parents' right to send children to private school); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (parents' right to have children instructed in foreign language). However, the Court has not characterized the provision of diapers or visitation with family members as the exercise of fundamental rights. *See Thompson*, 250 F.3d at 407. Therefore, the trespass policy as applied to the defendant must be judged under the rational basis test. *See Vacco v. Quill*, 521 U.S. 793, 799 (1997) (when legislation does not burden a fundamental right, it will be upheld "so long as it bears a rational relation to some legitimate end"). Under that standard of review, the trespass policy need only be rationally related to a legitimate governmental purpose, and the Court cannot "sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations." *Heller v. Doe*, 509 U.S. 312, 319 (1993) (quoting *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (*per curiam*)).

I conclude that the Authority's trespass policy passes constitutional muster under this test. The undisputed purpose of the policy is to create a safe, drug-free environment for the residents of Whitcomb Court. It cannot be

questioned, in my view, that the prevention of crime in public housing is a legitimate governmental goal. *See Department of Hous. & Urban Dev. v. Rucker*, ___ U.S. ___, 122 S. Ct. 1230, 1232 (2002) (recognizing "reign of terror" imposed by criminal activity in public housing). The policy of banning individuals who are not residents or employees of the Authority, or who cannot demonstrate a legitimate business or social purpose for coming onto the premises, is rationally related to, and advances, the legitimate governmental goal of preventing crime in public housing. Charging individuals with trespass when they enter upon the Authority's property after having been banned, as in the case of the defendant, also advances that goal. It must be remembered that the defendant is challenging his conviction for trespass in this appeal, not his barment from the Authority's property.

Based on the record in this case and for the stated reasons, I conclude that the defendant's arrest and conviction for trespassing did not violate his right of association afforded under the Fourteenth Amendment. Accordingly, I would reverse the judgment of the Court of Appeals and reinstate the defendant's conviction.*

Because I agree with section III(A) of the majority opinion, I respectfully concur in part and dissent in part.

---

* On brief, the defendant asserts a freedom to "loiter" based on a statement in a portion of *Morales* in which three justices joined, 527 U.S. at 53. He did not raise this specific argument before the trial court and is, therefore, precluded from doing so on appeal. *See* Rule 5:25.

5

Supreme Court, U.S.
FILED
MAR 7 2003
OFFICE OF THE CLERK

No. 02-371

In The
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

KEVIN LAMONT HICKS,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Virginia

BRIEF OF PETITIONER

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60 pp

QUESTIONS PRESENTED

1. May a criminal defendant escape conviction by invoking the overbreadth doctrine even though (i) his own offense did not involve any expressive conduct, and (ii) his conduct was not proscribed by that portion of the government statute, regulation or policy he challenges as overbroad?

2. In the context of government's attempts to exclude some non-residents from a public housing complex, does the Constitution recognize a distinction between actions taken by government as landlord and actions taken by government as sovereign?

LIST OF PARTIES

The petitioner is the Commonwealth of Virginia. The respondent is Kevin Lamont Hicks, who was convicted for trespass, under Virginia Code § 18.2-119, for returning to the property of a public housing project after being notified in writing not to do so.

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BRIEF OF PETITIONER

The Commonwealth of Virginia respectfully petitions this Court to reverse the judgment of the Supreme Court of Virginia, which held that portions of the trespass policy of a public housing authority violate the First Amendment and, on this basis, vacated the conviction of a criminal trespasser even though he was not engaged in any expressive conduct.

OPINIONS BELOW

The Supreme Court of Virginia held that portions of the trespass policy of the Richmond Redevelopment and Housing Authority ("Housing Authority") are overbroad and, thus, unconstitutional. On this basis, it affirmed the judgment by which the Court of Appeals of Virginia, sitting *en banc*, reversed the trespass conviction of the respondent, Kevin Lamont Hicks. The decision by the Supreme Court of Virginia is published as *Virginia v. Hicks*, 563 S.E.2d 674 (Va. 2002), and is reprinted in the Joint Appendix at J.A. 152. The *en banc* opinion of the Court of Appeals of Virginia is published as *Hicks v. Virginia*, 548 S.E.2d 249 (Va. App. 2001). It is reprinted at J.A. 121. The three-judge panel opinion of the Court of Appeals of Virginia, affirming the conviction of Hicks, is published as *Hicks v. Virginia*, 535 S.E.2d 678 (Va. App. 2000). It is reprinted at J.A. 98. The ruling whereby the Circuit Court of the City of Richmond denied Hicks' motion to dismiss is found at J.A. 48.

JURISDICTION

The opinion of the Supreme Court of Virginia was entered on June 7, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1257. A petition for writ of certiorari was filed on September 5, 2002. The writ of certiorari was granted on January 24, 2003.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

1. The First Amendment to the Constitution of the United States provides that "Congress shall make no law . . . abridging the freedom of speech . . . . "

2. The Fourteenth Amendment provides that " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . . "

3. The trespass statute implicated here, Virginia Code § 18.2-119, provides in pertinent part:

> Trespass after having been forbidden to do so; penalties. – If any person without authority of law goes upon or remains upon the lands, buildings or premises of another, or any portion or area thereof, after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian or other person lawfully in charge thereof, or after having been forbidden to do so by a sign or signs posted by such persons . . . on such lands, buildings, premises or portion of area thereof at a place or places where it or they may be reasonably seen . . . he shall be guilty of a Class 1 misdemeanor.

4. A copy of the ordinance by which the City of Richmond closed the streets inside the Whitcomb Court housing project and transferred ownership to the Housing Authority is found at J.A. 75.

5. The Housing Authority trespass policy, which is applicable to Whitcomb Court, provides in pertinent part:

> Richmond Redevelopment and Housing Authority hereby authorizes each and every sworn officer of the Richmond Police Department to enforce the trespass laws of the Commonwealth of Virginia as stated in Virginia Code § 18.2-119 upon Richmond Redevelopment and Housing Authority public housing property. Said property is that property located at and commonly known as . . . Whitcomb Court . . . [other Housing Authority properties are also listed].
>
> Richmond Redevelopment and Housing Authority further authorizes each and every Richmond Police Department officer to serve notice, either orally or in writing, to any person who is found on Richmond Redevelopment and Housing Authority property when such person is not a resident, employee, or such person cannot demonstrate a legitimate business or social purpose for being on the premises. Such notice shall forbid the person from returning to the property. Finally, Richmond Redevelopment and Housing Authority authorizes Richmond Police Department officers to arrest any person for trespassing after such person, having been duly notified, either stays upon or returns to Richmond Redevelopment and Housing Authority property.

J.A. 84.

STATEMENT OF THE CASE

"An open-air drug market. . . ."

Before the events giving rise to this case, this disturbing epithet fairly described the area known as Whitcomb Court. J.A. 45. A public housing project in Richmond, Virginia, Whitcomb Court suffered from the same crime epidemic that has plagued many housing projects across the country. The root of the problem was not the people living there, but those who came from the outside.[1]

Determined to provide greater protection to the residents of Whitcomb Court, the City of Richmond passed an ordinance in June of 1997, declaring that the streets *inside* the housing project were "no longer needed for the public convenience." The ordinance not only "closed" these streets to "public use and travel" but "abandoned" them as city streets. J.A. 76, 79 (street plan). The City then deeded the streets to the Housing Authority, the government entity that owns and operates this housing project.[2] J.A.

[1] As noted by the state supreme court, "[t]he majority of persons who had been arrested for drug crimes at the Whitcomb Court housing development were individuals who did not reside there." J.A. 154.

[2] The purposes of this action were explained in a brochure provided by the Housing Authority to residents of Whitcomb Court:

> To make communities safer by removing persons who commit unlawful acts which destroy the peaceful enjoyment of other residents.
>
> To ensure that children have places to play free of drug paraphernalia and the danger of gunshots and other criminal activity.
>
> To provide an opportunity for residents to develop safety initiatives in their community, such as resident patrols, social security number property identification, neighborhood watch, etc.

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81. The sidewalks that run adjacent to these streets were conveyed as part of the same transaction. The closed streets were those with no use other than to provide entrance and egress to the residential units on the property. None are through streets that continue beyond the Housing Authority property to other parts of the city. J.A. 79-80 (street plan).

The deed required the Housing Authority to give notice that it was now the owner, by "mak[ing] provisions to give the appearance that the closed streets, particularly at the entrances, are no longer public streets and that they are in fact private streets." J.A. 81, 82. Accordingly, the Housing Authority erected signs every 100 feet along the streets of Whitcomb Court and affixed them to each apartment building. J.A. 55-56, 154-55. Measuring one foot wide and one-and-a-half to two feet tall, the clearly visible red and white signs gave this warning:

NO TRESPASSING

PRIVATE PROPERTY

YOU ARE NOW ENTERING
PRIVATE PROPERTY AND
STREETS OWNED BY RRHA.

UNAUTHORIZED PERSONS
WILL BE SUBJECT TO
ARREST AND PROSECUTION.

> To hold households who knowingly harbor persons who engage in criminal activity accountable.

J.A. 87.

UNAUTHORIZED
VEHICLES WILL BE TOWED
AT OWNERS EXPENSE.

As the landlord of Whitcomb Court – and owner of the newly privatized streets and sidewalks – the Housing Authority then implemented a written policy aimed at preventing trespass on the premises. This written policy embodies two rules. The first rule (herein, "the Legitimate Purpose rule") states that persons who wish to visit Whitcomb Court must have a legitimate social or business purpose in order to do so.[3] Those who do not have a legitimate purpose are not charged with criminal trespass based on the first incident, but are told to leave and may be barred from returning. J.A. 23, 26-27, 84.

The second rule (herein, "the Trespass-After-Warning rule") states that an individual who has received notice that he is barred from Whitcomb Court, and who returns without permission, will be charged with criminal trespass.[4] Individuals who have been barred may seek permission to return by applying in writing to the Housing

[3] The pertinent text of the policy reads: "Richmond Redevelopment and Housing Authority further authorizes each and every Richmond Police Department officer to serve notice, either orally or in writing, to any person who is found on Richmond Redevelopment and Housing Authority property when such person is not a resident, employee, or such person cannot demonstrate *a legitimate business or social purpose for being on the premises*. Such notice shall forbid the person from returning to the property." J.A. 84 (emphasis added).

[4] The pertinent text of the policy reads: "Richmond Redevelopment and Housing Authority authorizes Richmond Police Department officers to arrest any person for trespassing after such person, *having been duly notified*, either stays upon or returns to Richmond Redevelopment and Housing Authority property." J.A. 84 (emphasis added).

Authority's director of housing operations. J.A. 34. In the absence of such permission, such individuals are prohibited from returning for *any* purpose. Residents remain free to invite visitors so long as the invitee is not someone who has been barred. J.A. 22, 87-88.

In addition to these two written rules, Gloria Rogers, the housing manager at Whitcomb Court, described an *unwritten addendum* that she followed in implementing the Legitimate Purpose rule. Under this unwritten addendum, visitors who wish to engage in leafleting must obtain her permission before doing so.[5] The obvious value of such an approach is that it prevents the written rule from being circumvented by those using leaflets as a ruse to gain access to the property for illegitimate purposes; however, there is no evidence that the managers at other Housing Authority properties follow a similar approach. As Ms. Rogers explained in her testimony, she has never turned down anyone wanting to pass out leaflets. She also explained that, if she saw something she was not comfortable in approving, she would refer it to her supervisor. J.A. 38. There is no evidence that her supervisor ever turned down anyone. There is likewise no evidence that either Ms. Rogers or her supervisor imposed any condition on

[5] Ms. Rogers also testified that non-residents wishing to hold meetings on the premises also must obtain permission in advance. J.A. 37. She said that such requests were sometimes referred to a "community council." J.A. 37. The meetings to which Ms. Rogers referred were apparently gatherings held in the Whitcomb Court common space. In any event, it was leafleting – not meetings – that the state supreme court thought was improperly subject to Ms. Rogers' discretion. *See* J.A. 165-166.

approval, or that they failed to give prompt consideration to any request.

Crucial to this case is the Virginia criminal trespass statute, Virginia Code § 18.2-119. A broad statute of general application, this law makes it a crime for "any person without authority of law [to go] . . . upon the lands . . . or premises of another . . . after having been forbidden to do so, either orally or in writing, by the owner . . . or other person lawfully in charge thereof."

The respondent, Hicks, has a record of criminal misconduct at Whitcomb Court reaching back a year before the offense that is the subject of this case. Twice in 1998 – once on February 10 and, again, on June 26 – he was convicted of trespassing at the housing project. In addition, on April 27, 1998, he was convicted of damaging property at Whitcomb Court. J.A. 99, 124-125. While the property damage charge was pending, the Housing Authority gave Hicks written notice barring him from the premises, thereby documenting what his previous convictions should have already taught him: that his return to Whitcomb Court would subject him to criminal liability. The notice was hand-delivered to him outside the courtroom on April 14, 1998. J.A. 63, 90. There is no question about his receipt of notice. Hicks signed an acknowledgment in the presence of a police officer. J.A. 23, 63.[6]

[6] The letter provided, in part: "This letter serves to inform you that effective immediately you are not welcome on Richmond Redevelopment and Housing Authority's Whitcomb Court or any Richmond Redevelopment and Housing Authority property. This letter is an official notice informing you that you are not to trespass on RRHA property. *If you are seen or caught on the premises, you will be subject to arrest by the police.*" J.A. 90 (emphasis added).

While Hicks twice asked for permission to return, his requests were oral and were made only to Ms. Rogers, the Whitcomb Court housing manager. J.A. 39-40. On both occasions, she turned him down, thereby leaving in place the notice not to return and the expectation of arrest if he should do so. There is no evidence that Hicks ever availed himself of the written procedures by which such a request might be properly considered by the Housing Authority official charged with such decisions. Nor did he otherwise seek to challenge his status as *persona non grata*. Instead, in direct defiance of the notice, he simply went back to the property.

In January of 1998, a Richmond police officer who knew Hicks – and knew he was barred – saw him walking along the sidewalk adjacent to Bethel Street, one of the streets closed to public traffic and conveyed to the Housing Authority. Thus, he was *inside* Whitcomb Court, on property owned by the Housing Authority, where he had been told not to return.[7] Pursuant to the Trespass-After-Warning provision of the written policy, the officer gave Hicks a summons for trespass.[8] J.A. 3, 55.

[7] The fact that Hicks was *inside* of Whitcomb Court is shown by the opinion of the state supreme court, which noted: "Bethel Street is one of the streets that the City conveyed to the Housing Authority and that *street is located entirely within Whitcomb Court.*" J.A. 156 (emphasis added). The fact is further demonstrated by the street plan attached to the ordinance and deed. J.A. 79. As this plan shows, Bethel Street begins and ends within Whitcomb Court. Full-size copies of the street plan have been lodged with the Court.

[8] When confronted by the officer, Hicks claimed that he was there "bringing pampers [*i.e.* diapers] to his baby." J.A. 57. Yet, there is no evidence that the officer saw any diapers. No witnesses testified that Hicks delivered any diapers, or that he had been invited on the

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Hicks was tried and convicted of criminal trespass in the General District Court of the City of Richmond on April 12, 1999.[9] He appealed this conviction to the Circuit Court of the City of Richmond where, pursuant to Virginia law, he received a trial *de novo*. Va. Code §§ 16.1-132, 17.1-513. Before his trial in the circuit court, Hicks moved to dismiss the charge on the grounds that the Legitimate Purpose rule in the written policy violated the federal and state constitutions, listing as his federal constitutional claims the First and Fourteenth Amendments. Hicks challenged the Legitimate Purpose rule on three grounds. First, in his written motion to dismiss, he asserted that he had a constitutional right to be present on the property regardless of his purpose. J.A. 6, ¶¶ 13-14.[10] Second, also in his written motion to dismiss, he contended that he had a constitutional right to visit his friends and relatives who were residents of Whitcomb Court. J.A. 6, ¶¶ 13-14. Third, at the hearing, he attacked the unwritten addendum that his counsel discovered through the in-court examination of

premises, or even that he was welcome there. In short, there is no evidence corroborating his unsworn claim that he was "bringing pampers" or suggesting that he had any other reason to be on the premises. Moreover, there is nothing in the trespass policy that would allow such an excuse – even if true – to override a notice not to return.

[9] In Virginia, a general district court is a court not of record in which misdemeanors are tried in bench trials. Va. Code § 16.1-123-1.

[10] In his written motion, Hicks asserts violations of the "fundamental rights to freedom of association, speech, and assembly," J.A. 6, ¶ 13, as well as violations of the "Due Process, Equal Protection and Privileges [or] Immunities Clauses of the Fourteenth Amendment." J.A. 6, ¶ 14. Basically, Hicks is arguing that he has a right to be present on the sidewalks and a right to visit with his friends and relatives who are residents of Whitcomb Court.

Ms. Rogers, the Whitcomb Court housing manager. Notably, he did *not* challenge the decision by the Housing Authority to bar him from Whitcomb Court. The circuit court denied the motion to dismiss without elaboration. J.A. 48. On July 29, 1999, a bench trial was held and Hicks was again convicted of trespassing. He was sentenced to 12 months in jail and a $1,000 fine, both of which were suspended.[11] J.A. 68.

Hicks appealed his conviction to the Court of Appeals of Virginia, where he repeated his challenges to the Legitimate Purpose rule. Hicks argued: (1) that he had a constitutional right to be present at Whitcomb Court, (2) that he had a constitutional right to visit his friends and relatives who were residents of Whitcomb Court, and (3) that Ms. Rogers' unwritten addendum was unconstitutional. A divided three-judge panel of the Court of Appeals rejected all of his constitutional claims and affirmed the decision of the trial court. J.A. 98. Hicks then sought and obtained a rehearing *en banc* by the Court of Appeals, which, in a 6-5 decision, agreed with Hicks that he had a constitutional right to be present at Whitcomb Court. J.A. 121. Specifically, the *en banc* court held that, notwithstanding the ordinance and deed, the streets in Whitcomb Court remained a public forum, and that the Housing Authority's efforts to regulate speech in that forum failed

[11] Based on the same evidence, Hicks was also found to have violated the terms of the suspended sentences imposed as a result of his previous three convictions.

strict scrutiny and thus violated the First Amendment. The trespass conviction was overturned.[12]

The Commonwealth then sought and obtained review by the Supreme Court of Virginia, which affirmed the *en banc* decision of the Court of Appeals, but on completely different grounds. The state supreme court refrained from deciding whether Hicks had a constitutional right to be present at Whitcomb Court. J.A. 166-67. Instead, it held that Ms. Rogers' unwritten addendum to the Legitimate Purpose rule was unconstitutional and, on that basis, vacated Hicks' conviction.[13] The court reached this result despite the fact that: (1) there was no evidence that Hicks was ever engaged in – or ever sought to engage in – any expressive conduct at Whitcomb Court, and (2) Hicks was prosecuted under the criminal trespass statute because he violated the barment notice, not the Legitimate Purpose rule or Ms. Rogers' addendum. Nevertheless, the Supreme Court of Virginia held that – under this Court's overbreadth doctrine – Hicks was entitled to complain that the Legitimate Purpose rule was unconstitutional and that he was entitled to attack Ms. Rogers' unwritten addendum as a means of demonstrating the alleged invalidity. In so ruling, the court rejected the Commonwealth's argument that Hicks was not entitled to challenge the constitutional validity of the Housing Authority's policies in the

[12] The trial court order revoking suspension of his three previous sentences was not set aside. Instead, the Court of Appeals remanded the issue to the trial court to reconsider the revocation in light of its opinion. J.A. 136 n.4.

[13] The grounds on which the Court of Appeals had ruled for Hicks were expressly vacated. J.A. 166-67. Hicks' state law claims were not addressed.

prosecution for trespass. It also ignored the decisions of other state and federal courts upholding the constitutionality of trespass-after-warning statutes.

Two members of the Supreme Court of Virginia dissented, noting "the majority does not separate the question of standing from its substantive First Amendment analysis." J.A. 168. The dissenting Justices found that Hicks lacked standing to assert a facial challenge to the trespass policy under the overbreadth doctrine, that he may only challenge the policy as it was applied to him, and that, as so applied, it was constitutional. The dissent also relied on this Court's decision in *Department of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125 (2002), and explicitly noted the special concerns that arise when government acts as landlord of a public housing project:

> The policy of banning individuals who are not residents or employees of the Authority, or who cannot demonstrate a legitimate business or social purpose for coming onto the premises, is rationally related to, and advances, the legitimate governmental goal of preventing crime in public housing. Charging individuals with trespass when they enter upon the Authority's property after having been banned, as in the case of the defendant, also advances that goal. It must be remembered that the defendant is challenging his conviction for trespass in this appeal, not his barment from the Authority's property.

J.A. 176.

The Commonwealth then petitioned for certiorari, asking this Court (1) to establish a bright line limiting the use of overbreadth standing, and (2) to recognize a constitutional distinction between government acting as

landlord and government acting as sovereign, a distinction that is necessary to protect residents of public housing from the criminals under whose sway those at Whitcomb Court and elsewhere often have been forced to live. Certiorari was granted.

SUMMARY OF ARGUMENT

First, this Court should announce limits on overbreadth standing. The state supreme court's decision demonstrates the need for such limits. Although this Court created the overbreadth doctrine as an exception to the general rules of standing, it has never expressly articulated a bright line beyond which the overbreadth rationale is so attenuated that a criminal defendant will not be able to avail himself of the doctrine. Without a clear outer limit, the state supreme court went astray in a radical expansion of the overbreadth doctrine. Specifically, Hicks was allowed to bring an overbreadth challenge even though (1) he was not engaged in expressive activity, and (2) his conduct was not prohibited by that portion of the policy that he challenged as overbroad. Such an expansion of the overbreadth doctrine leads to extreme results and will frustrate the ability of government agencies to prevent trespass on their premises.

This Court should adopt a bright-line rule limiting the overbreadth doctrine to those situations where: (1) the defendant was engaged in expressive conduct, and (2) his conduct was prohibited by that portion of the statute, regulation, or policy that the defendant challenges. Adopting such a limitation reflects the traditional principles of Article III standing and is consistent with this Court's

previous overbreadth decisions. The adoption of either part of the Commonwealth's proposed bright-line rule will require reversal of the decision below.

Second, the Constitution recognizes a distinction between government acting as landlord and government acting as sovereign. As landlord, government may take measures that it could not take as sovereign. The need to protect the safety of public housing tenants justifies such a distinction. In *Rucker*, this Court recognized such a distinction, though without defining its contours. Such a distinction does not imperil constitutional rights.

The distinction between sovereign and landlord provides additional reasons why the decision below must be reversed. The unwritten addendum to the Legitimate Purpose rule is constitutional. This is so because (1) the overbreadth doctrine may not be used to challenge a policy adopted by government as landlord, and (2) even if the overbreadth doctrine is applicable to the policy at issue here, the alleged overbreadth is neither real nor substantial. Moreover, there is no constitutional right to be present on the sidewalks or streets within Whitcomb Court, and freedom of association does not include visiting residents after being barred.

ARGUMENT

I. THE COURT SHOULD PLACE LIMITS ON THE USE OF OVERBREADTH STANDING.

A. Overview of Overbreadth Standing.

Under the traditional rule, "a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York v. Ferber,* 458 U.S. 747, 767 (1982) (citing *Broadrick v. Oklahoma,* 413 U.S. 601, 610 (1973)). The rule is based on three fundamental principles. First, "constitutional rights are personal and may not be asserted vicariously." *Broadrick,* 413 U.S. at 610 (citing *McGowan v. Maryland,* 366 U.S. 420, 429-30 (1961)); *see also Ferber,* 458 U.S. at 767. Second, the rule reflects "prudential limitations on constitutional adjudication." *Ferber,* 458 U.S. at 767. "[I]t would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation." *Id.* at 768 (internal quotation marks and citations omitted). Third, the rule is "grounded in Art. III limits on the jurisdiction of federal courts to actual cases and controversies." *Id.* at 768 n.20.

Notwithstanding the first two principles – and acting within the limits imposed by the third – this Court created the overbreadth doctrine in order to expand the ability of courts to protect the First Amendment, a constitutional principle of paramount importance:

> [T]he Court has altered its traditional rules of standing to permit – in the First Amendment area – "attacks on overly broad statutes with no requirement that the person making the attack

> demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

Broadrick, 413 U.S. at 612 (quoting *Dombrowski v. Pfister,* 380 U.S. 479, 486 (1965)). In other words, when First Amendment values are implicated, the constitutional barriers to standing are lower. Under the overbreadth doctrine, a criminal defendant may sometimes – though not always – escape conviction by showing that the statute under which he is prosecuted unconstitutionally restricts the expression of third parties.[14] *See, e.g., Schaumburg v.*

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[14] For a variety of reasons, individual members of this Court have expressed serious doubts about the legitimacy of the overbreadth doctrine. *See Secretary of State of Md. v. Joseph H. Munson Co.,* 467 U.S. 947, 976 (1984) (Rehnquist, J., joined by Burger, C.J., Powell, and O'Connor, J.J., dissenting) ("Musings as to possible applications of a statute to third parties in hypothetical situations may be fitting for the classroom and the statehouse, but they are neither wise nor permissible in the courtroom."); *Ferber,* 458 U.S. at 780-781 (Stevens, J., concurring in the judgment) ("When we follow our traditional practice of adjudicating difficult and novel constitutional questions only in concrete factual situations, the adjudications tend to be crafted with greater wisdom. Hypothetical rulings are inherently treacherous and prone to lead us into unforeseen errors; they are qualitatively less reliable than the products of case-by-case adjudication."); *Lewis v. New Orleans,* 415 U.S. 130, 136-37 (1974) (Blackmun, J., joined by Burger, C.J., and Rehnquist, J., dissenting) (noting that the overbreadth doctrine is "being invoked indiscriminately without regard to the nature of the speech in question, the possible effect the statute or ordinance has upon such speech, the importance of the speech in relation to the exposition

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Citizens for a Better Env't, 444 U.S. 620, 634 (1980) (noting that, in First Amendment context, "courts are inclined to disregard the normal rule against permitting one whose conduct may validly be prohibited to challenge the proscription as it applies to others . . . ").

Although this Court has stepped beyond traditional rules of standing for the sake of the First Amendment, it has nonetheless reaffirmed that "under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick,* 413 U.S. at 610-11 (citing *Younger v. Harris,* 401 U.S. 37, 52 (1971)). Thus, *Broadrick* did not go so far as to say that an allegedly unconstitutional provision may be challenged by *anyone* at all. This Court still requires a sufficient nexus between a litigant and the statute he attacks. Without such a nexus, the litigant has no standing. Under *Broadrick,* how close the nexus must be in order to provide standing varies, depending on the circumstances. The ability of a criminal defendant to invoke the overbreadth doctrine "*attenuates* as the otherwise unprotected behavior that [the First Amendment] forbids the State to sanction moves from 'pure speech' toward conduct and that conduct – even if expressive – falls within the scope of otherwise valid criminal laws. . . ." *Broadrick,* 413 U.S. at 615 (emphasis added). In other words, this Court has left no doubt that there are limits on overbreadth standing.

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of ideas, or the purported or asserted community interest in preventing that speech."). Even so, the Commonwealth does not ask the Court to abolish the overbreadth doctrine, only to place meaningful limits on its use.

B. The Decision Below Represents a Radical Expansion of the Overbreadth Doctrine and Leads to Extreme Results.

Although this Court has made it clear that overbreadth standing operates within a fairly confined area, the Supreme Court of Virginia treated the doctrine as if it were virtually unbounded. Its ruling expands the doctrine beyond anything contemplated by this Court's decisions and leads to extreme results.

1. The State Supreme Court's Decision Radically Expands the Overbreadth Doctrine.

The decision below expands the overbreadth doctrine in two fundamental ways. First, the state supreme court allowed Hicks to raise an overbreadth challenge even though he was not engaged in *any* expressive activity at the time of his offense.[15] Moreover, there is nothing to suggest that expressive activity was involved in his barment from Whitcomb Court, nor is there any suggestion that his previous convictions for misconduct at Whitcomb Court – two for trespass and one for damaging property – were related to any expressive activity. Indeed, there is no evidence that he was *ever* involved in any expressive activity at Whitcomb Court. Hicks is simply a common trespasser and an incorrigible one.

Second, the state supreme court allowed Hicks to bring an overbreadth challenge against a Housing

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[15] Indeed, Hicks did not even *claim* to be involved in any expressive activity, but told the police officer that he was delivering diapers.

Authority rule that was completely different from the one he violated – and separate from the criminal statute under which he was prosecuted. Hicks prevailed on that challenge, not based on the face of the challenged rule, but on the unwritten addendum. In order to understand this second aspect of the decision below, it is necessary to bear in mind the nature of the trespass policy – and statute – at issue. The Housing Authority's written policy embodies two rules: (1) the Legitimate Purpose rule, which says that persons who wish to visit Whitcomb Court must have a legitimate social or business purpose in order to do so. *Supra* at 6, n.3; (2) the Trespass-After-Warning rule, which says that an individual who has received notice that he is barred from Whitcomb Court, and who returns without permission, will be charged with criminal trespass. *Supra* at 6, n.4. In addition to these two written rules, there is the unwritten addendum implemented by Ms. Rogers, the housing manager at Whitcomb Court, which requires visitors who wish to engage in leafleting to obtain her permission before doing so. *Supra* at 7. Finally, there is the criminal trespass statue, Virginia Code § 18.2-119, which is a statute of general application, existing separate and apart from policies of the Housing Authority.

Hicks was not convicted because he violated the Legitimate Purpose rule nor its unwritten addendum. That is to say, he was not convicted because his stated purpose – "bringing pampers" – was adjudged illegitimate, nor was he convicted because he sought to engage in leafleting without obtaining permission under Ms. Rogers' unwritten addendum. He was convicted of criminal trespass under § 18.2-119 because he was found on the

premises of Whitcomb Court after being informed, repeatedly, that he was not to return.[18]

Although Hicks violated the Trespass-After-Warning rule – and the criminal trespass statute – the state supreme court believed the overbreadth doctrine gave him standing to challenge the Legitimate Purpose rule. Concluding that Ms. Rogers' unwritten addendum was unconstitutional, it struck down the entire trespass policy – not just the problematic addendum. Having thus struck down the policy, the state supreme court then allowed Hicks to escape conviction for criminal trespass even though the statute he violated was left undisturbed.

In sum, it was only by the state supreme court's twofold expansion of the overbreadth doctrine that Hicks was able to prevail. He was not engaged in any expressive activity, and his own activity was not governed by the rule he challenged. Yet, he was still able to escape conviction for a crime for which he was clearly guilty. Such a result has no precedent in this Court's jurisprudence and, if adopted, would lead to extreme results.

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[18] Indeed, the right of the Housing Authority to tell Hicks not to return – and to prosecute him if he does return – does not depend on there being a pre-existing formal policy governing access to the premises. *See Adderley v. Florida*, 385 U.S. 39 (1966) (upholding trespass conviction of protestors refusing to leave premises of county jail where their arrest occurred without benefit of any formal access policy).

2. The State Supreme Court's Decision Will Lead to Extreme Results.

The state supreme court's two-fold expansion of the overbreadth doctrine opens the door to extreme results. If adopted by this Court, it would effectively prevent any government agency from protecting its property against trespass – and related threats – unless the agency could demonstrate a "speech policy" that is constitutionally pristine.

Each of the two ways that the court expanded the doctrine will generate its own set of extreme results. An example of each will suffice to illustrate the magnitude of the problem. First, a state university might reasonably prohibit non-students from being present in a women's dormitory after a certain hour without permission from the dorm counselor, and post signs warning that violators of the rule will be prosecuted. A vagrant is found lurking in the dormitory late at night and is charged with trespassing. He is not there to pass out leaflets, or to engage in any other activity protected by the First Amendment. Yet, under the state supreme court's view of overbreadth, this trespasser could escape conviction simply by showing that the dorm counselor did not have a constitutionally acceptable set of standards by which she granted or denied permission to non-students to engage in after-hours leafleting. By allowing those not engaged in expressive activity to raise a First Amendment challenge, the state supreme court invites precisely such an extreme result.

Second, the decision below goes even further in that it allows a trespasser to escape conviction by challenging a rule not implicated by his own conduct. Here, too, the

extreme results are easily foreseen. A municipality operating a baseball stadium might promulgate a set of rules governing spectator conduct and provide that failure to comply would result in being expelled from the stadium. One rule – surely constitutional – prohibits fighting and drunkenness. Another rule – surely *un*constitutional – prohibits fans from displaying signs critical of the home team.[17] Under the state supreme court's approach, a drunken and belligerent spectator who refused to leave could escape conviction for trespass by challenging the sign restriction, even though he never sought to display any sign. This Court ought not countenance such a result. The trespasser who has been barred should not be allowed to escape conviction by challenging rules not implicated by his own conduct.

It is, of course, not just state universities or baseball stadiums where the ability to ban trespassers would be undermined by the state supreme court's two-fold expansion of overbreadth standing. Public schools, military bases, courts, post offices and government property of every sort would also be affected. Government certainly should be encouraged to use care in drafting policies that seek to regulate expressive activities, *see Board of Regents of the Univ. of Wis. v. Southworth,* 529 U.S. 217, 233 (2000), but government also must have the authority to exclude unauthorized persons from government property

[17] Such a scenario is not far-fetched. *See, e.g., Aubrey v. Cincinnati Reds*, 841 F. Supp. 229 (S.D. Ohio. 1993); *Aubrey v. City of Cincinnati*, 815 F. Supp. 1100 (S.D. Ohio 1993) (describing constitutionally problematic sign regulations at the former Riverfront Stadium, home of the Cincinnati Reds).

that is not open to the general public. "Government, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 800 (1985) (internal quotation marks and citations omitted). The state supreme court's expansion of overbreadth standing effectively conditions the right to enforce trespass laws on absolute compliance with the complex nuances of First Amendment law in all situations that may arise on the premises. Such a linkage has no basis in the Constitution's text or this Court's jurisprudence.[18]

C. The Overbreadth Doctrine Should Be Limited to Cases Where the Challenger Was Engaged in Expressive Conduct and Where His Conduct Was Prohibited by the Statute, Regulation, or Policy Challenged.

This Court's previous overbreadth decisions do not expressly establish a line beyond which the overbreadth

[18] The two examples used by the Commonwealth deal with the expanded use of overbreadth by criminal defendants. However, overbreadth claims often are brought by civil plaintiffs who seek to enjoin a statute regulating expressive activities in which they desire to engage. In affording litigants overbreadth standing, this Court's decisions have not distinguished between criminal defendants and civil plaintiffs. Thus, if criminal defendants need not engage in expressive conduct in order to raise an overbreadth challenge, then it is difficult to see how such a requirement could be imposed on civil plaintiffs. The result would be that *anyone* could challenge *any* statute regulating speech, even where that statute has no relevance for the plaintiff other than offending his notions of sound public policy.

rationale is clearly so attenuated that the criminal defendant may not avail himself of the doctrine. It is the lack of a bright line that allowed the state supreme court to go astray in the case at bar. In order to correct this error – and prevent similar errors by other courts – this Court should now mark an outer boundary beyond which the overbreadth doctrine does not apply.[19]

The bright line sought by the Commonwealth is simply this: before a criminal defendant may be allowed to escape conviction by vindicating the First Amendment rights of others, he must at least show (1) that *his own* conduct involved some sort of expressive activity, and (2) that his conduct falls within the particular prohibition he challenges as overbroad. Where he cannot make such a showing, the traditional rules of standing should apply. Such a bright line would reflect Article III standing principles and would help to reconcile the traditional rule with the overbreadth exception. The proposed bright line is fully consistent with this Court's previous pronouncements on overbreadth. Adoption of such a bright line would not break new ground; it would merely tend to ground that has already been plowed.

[19] This is not to say that all cases *within* the outer boundary must qualify for overbreadth standing. The Court may prefer to address the interstices in future cases. What is important here is for the Court to establish a boundary beyond which overbreadth standing is clearly unavailable.

1. The Proposed Bright-Line Rule Reflects Traditional Principles of Article III Standing.

There are three general principles that underlie traditional Article III standing. *See Ferber*, 458 U.S. at 767-68; *supra* at 16. Although the overbreadth doctrine has limited the influence of these principles, it has not repudiated them. The Commonwealth's proposed bright-line rule respects those principles while preserving the availability of the overbreadth doctrine in protection of the First Amendment.

In the overbreadth context, the traditional rule that constitutional rights may not be asserted vicariously requires that there must be a meaningful nexus between a party's conduct and the free speech rights he seeks to vindicate. The proposed rule would assure such nexus by requiring the challenger to be engaged in *some* form of expressive conduct and by requiring his conduct to be prohibited by the statute, regulation or policy he challenges. Absent such a rule, it is difficult to see where a principled line could be drawn. Indeed, without such a line, the principle that constitutional rights may not be asserted vicariously would be wholly discarded.

Second, the proposed rule reflects the principle of "prudential limitations on constitutional adjudication." *Ferber*, 458 U.S. at 767. This Court does not "consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation." *Id.* at 768 (internal quotation marks and citations omitted). Thus, before a statute will be invalidated for overbreadth, the Court must conclude that overbreadth "must not only be real, but substantial as well, judged in

relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615. Making such an assessment involves a comparison between the legitimate and illegitimate applications of the statute in question. This can be difficult enough in the classic overbreadth challenge where the challenger's own conduct involves expression and where he challenges a statute prohibiting that conduct. But where, as here, a court has before it *no* expressive activity by the challenger, and where he attacks a provision *different* from the one regulating his conduct, there are even fewer facts on which to base the necessary judicial balancing. Analysis dissolves into pure speculation. By contrast, the proposed rule would limit overbreadth standing in a way that recognizes the relevant prudential considerations and thereby promotes sound judicial decision-making.

Finally, the proposed rule reflects the principle, embodied in the text of Article III, that there be an "actual case or controversy." Neither this Court nor the lower federal courts issue advisory opinions on the constitutionality of a statute, regulation or policy. *See Broadrick,* 413 U.S. at 611. Nor do the state courts do so in carrying out their duty to apply federal law. Rather, any judicial pronouncement on constitutionality requires that a party be subject to the application – or at least the potential application – of the statute, regulation, or policy he challenges. *See Younger*, 401 U.S. at 52 (federal courts should not "survey the statute books and pass judgment on laws before the courts are called upon to enforce them."). In the typical overbreadth case, this requirement is satisfied by the fact that the party making the challenge has engaged – or seeks to engage – in expressive conduct that is prohibited by the provision he attacks. *See Ferber*, 458 U.S. at

768 n.20. However, where, as here, the defendant's conduct is not expressive – and does not violate the policy that he seeks to challenge – there is no case or controversy. Allowing a challenge in such a situation would convert the judiciary into the sort of "roving commissions" this Court has scorned as alien to our constitutional system. *Broadrick*, 413 U.S. at 611.

2. The Proposed Bright-Line Rule Is Consistent with This Court's Previous Overbreadth Decisions.

Both elements of the Commonwealth's proposed bright-line rule are consistent with this Court's previous overbreadth decisions. This consistency is reflected in three ways.

First, language in the seminal overbreadth cases – *Dombrowski* and *Broadrick* – signals an intention that the overbreadth doctrine be limited to parties who are engaged in expressive conduct. As *Broadrick* said, "the Court has altered its traditional rules of standing to permit – in the First Amendment area – 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with *the requisite narrow specificity*.'" 413 U.S. at 612 (emphasis added) (quoting *Dombrowski*, 380 U.S. at 486). Strongly implied is the idea that the conduct of the challenger be *expressive* conduct, for it is in the area of expressive conduct – not conduct generally – that "narrow specificity" is required. *See, e.g., Broadrick*, 413 U.S. at 611 ("[S]tatutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn. . . . "); *Shelton v. Tucker*, 364

U.S. 479, 488 n.8 (1960) (noting that, in areas not involving fundamental personal liberties, "more administrative leeway has been thought allowable in the interest of increased efficiency in accomplishing a clearly constitutional central purpose.") It is not necessary, of course, that the expressive conduct be protected by the First Amendment, but it must, at least, be expressive.

Second, in actual practice, this Court's recognition of overbreadth standing has been limited to cases where the challenger was engaged – or sought to engage – in some sort of expressive conduct. This is true in all six overbreadth cases cited by the Supreme Court of Virginia.[20] It is also true in other cases where this Court sustained overbreadth challenges.[21] Thus, this Court's jurisprudence

[20] *See Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32 (1999) (upholding statute regulating *publisher's* access to arrestees' addresses held by police); *Ferber* (upholding conviction of *bookseller* who sold films depicting sexual activities of young boys in violation of statute); *Broadrick* (upholding statute limiting *partisan political activity* by state employees); *Gooding v. Wilson*, 405 U.S. 518 (1972); (affirming habeas relief for *war protestor* convicted of using opprobrious words and abusive language tending to cause breach of the peace, based on overbreadth of statute); *Dombrowski* (allowing *civil rights organizations* to bring suit to enjoin prosecution under subversive activities statute); *Thornhill v. Alabama*, 310 U.S. 88 (1940) (overturning conviction of *picketer* under statute found to be overbroad).

[21] *See, e.g., Houston v. Hill*, 482 U.S. 451 (1987) (striking down a statute prohibiting interruption of police officer in performance of his duties; criminal defendant shouted at police officers); *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (striking down regulation banning "all First Amendment activities" at Los Angeles airport; plaintiff was seeking to distribute religious literature); *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980) (holding invalid ordinance regulating solicitation of contributions; plaintiff was denied permit to solicit contributions); *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984)

(Continued on following page)

consistently – if implicitly – reflects the first element of the Commonwealth's proposed bright-line rule.[22] Likewise, the Commonwealth's research reveals no case in which a criminal defendant was permitted to raise an overbreadth challenge when his own conduct did not implicate a statute, regulation or policy being challenged. Thus, the second element of the proposed bright-line rule is likewise consistent with this Court's jurisprudence. In short, adoption of the proposed bright-line rule would not cast doubt on the result of any case previously decided by this Court.

Third, the proposed bright-line rule is in keeping with this Court's history of treating overbreadth as "strong medicine" to be employed "sparingly and only as a last resort." *Broadrick*, 413 U.S. at 613. It is also consistent with the Court's observation that "[o]verbreadth claims, if entertained at all, have been curtailed when invoked against ordinary criminal laws that are sought to be

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(striking down restrictions on expenditures charities may devote to solicitation; plaintiff was fundraising corporation); *Schard v. Mount Ephraim*, 452 U.S. 61 (1981) (reversing conviction of adult bookstore owner for violation of statute banning all live entertainment; criminal defendant operated booth that displayed live nude dancers); *Coates v. Cincinnati*, 402 U.S. 611 (1971) (striking down ordinance prohibiting "three or more persons to assemble . . . on any of the sidewalks" and "conduct themselves in a manner annoying to persons passing by;" criminal defendants were picketers in labor dispute).

[22] Academic commentators have also suggested that a party must be engaged in expressive activity before he may invoke the overbreadth doctrine. *See, e.g.*, Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853, 896 (1991) (arguing that "courts should hesitate to find substantial overbreadth" where a statute "aims to promote state interests unrelated to the content of expression and that infringes First Amendment interests only incidentally").

applied to protected conduct." *Id.* Because the overbreadth doctrine applies only in exceptional circumstances, a criminal defendant should not be allowed to raise it where he has not engaged in expressive conduct or where he is not challenging the provision he is charged with violating.

D. The State Supreme Court's Judgment Must Be Overturned.

If this Court adopts either or both elements of the proposed bright-line rule – or some similar limitation on the overbreadth doctrine – then the judgment of the state supreme court must be reversed. Hicks was not engaged in expressive activity, and the Trespass-After-Warning rule and criminal statue that Hicks violated are fundamentally different from the unwritten addendum that the court found was unconstitutional. The addendum did not apply to his conduct. *See supra* at 19.

Even if this Court declines to announce the proposed bright-line rule, the judgment below still must be reversed. When government acts as landlord – rather than as sovereign – the overbreadth doctrine should not apply. *See infra* at 45. Even if it does apply, government as landlord should be afforded a larger measure of discretion, and the overbreadth alleged by Hicks is neither real nor substantial. *See infra* at 47.

II. THE CONSTITUTIONAL DISTINCTION BETWEEN SOVEREIGN AND LANDLORD REQUIRES REINSTATEMENT OF HICKS' CONVICTION.

A. There Is a Constitutional Distinction Between Government as Sovereign and Government as Landlord.

As this Court has recognized, there is a constitutional distinction between government acting as sovereign and government acting as landlord. As landlord, government may take measures the Constitution would forbid if imposed by the sovereign. This distinction provides yet another basis for rejecting Hicks' overbreadth challenge and wholly undermines his argument that he has a constitutionally protected right to be present at Whitcomb Court. For these additional reasons, the judgment of the state supreme court must be reversed.

1. *Rucker* Recognizes a Distinction Between Sovereign and Landlord in the Context of Public Housing.

In *Rucker*, this Court, without dissent, recognized that there is a constitutional distinction between government acting as sovereign and government acting as landlord.[23] At issue in *Rucker* was whether the eviction policy of a public housing project violated due process. Mandated by Congress, the policy required the eviction of a tenant if

[23] Justice Breyer did not participate in *Rucker*. The other eight members of this Court joined the Chief Justice's Opinion. *See Rucker*, 535 U.S. at 126.

illegal drugs were found in his residence, whether or not he knew about them. Reversing the Ninth Circuit, this Court explained:

> The en banc Court of Appeals held that HUD's interpretation "raise[s] serious questions under the Due Process Clause of the Fourteenth Amendment," because it permits "tenants to be deprived of their property interest without any relationship to individual wrongdoing." 237 F.3d at 1124-25 (citing *Scales v. United States*, 367 U.S. 203, 224-225 (1961)); *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482 (1915)). *But both of these cases deal with the acts of government as sovereign.* In *Scales*, the United States criminally charged the defendant with knowing membership in an organization that advocated the overthrow of the United States Government. In *Danaher*, an Arkansas statute forbade discrimination among customers of a telephone company. The situation in the present cases is entirely different. *The government is not attempting to criminally punish or civilly regulate respondents as members of the general populace. It is instead acting as a landlord of property that it owns, invoking a clause in a lease to which respondents have agreed and which Congress has expressly required. Scales and Danaher cast no constitutional doubt on such actions.*

Id. at 135 (emphasis added) (citations original). In other words, this Court recognized that, when government acts as landlord, it may take measures that the Constitution would forbid if it were acting as sovereign. Although *Rucker* involved the eviction of tenants rather than the exclusion of non-residents, there is no principled reason for the distinction between sovereign and landlord to apply

in the context of one public housing regulation but not the other. *Rucker* allows government, acting as landlord, to evict a *tenant* because one of the tenant's friends or relatives has engaged in misconduct on the premises. *Rucker*, 535 U.S. at 136. Surely, that same landlord may exclude *non-residents* who have engaged in misconduct on the premises, and it may also *deter* such misconduct by requiring non-residents to have a legitimate purpose in order to be on the premises. This is especially so when, as here, there is a clear record of drug-dealing and related violence on the premises by outsiders. J.A. 45-46, 154.

The prevalence of drug-dealing and related crimes at public housing projects is beyond dispute, not only at Whitcomb Court, but nationwide. Indeed, Congress explicitly found:

> [D]rug dealers are increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants.
>
> [T]he increase in drug-related and violent crime not only leads to murders, muggings, and other forms of violence against tenants, but also to a deterioration of the physical environment that requires substantial government expenditures.

42 U.S.C. § 11901(3) and (4) (Congressional findings) (quoted in *Rucker*, 535 U.S. at 127).

In the private sector, landlords of apartment projects have strong incentives to protect their property – and their tenants – from such criminal activities. Their vigilance is not just the product of civic mindedness. It is spurred by

the forces of competition and, often, by the legal liability landlords risk if they do not take steps to protect the safety of their tenants.[24]

As a result, private sector landlords often take a variety of precautions. They may require visitors to have a legitimate purpose for coming on the property and may forbid outsiders from simply wandering onto their streets and sidewalks. They may tell those who have no legitimate purpose to leave, and they may call upon the police to arrest those who refuse to leave or who persist in returning without permission. They may require those who wish to solicit or to leaflet to get prior approval from management. There is nothing extraordinary about these measures. They are all very basic.[25] But, the low-income tenants in public housing often have few choices about where they

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[24] *See, e.g., Doe v. Dominion Bank, N.A.*, 963 F.2d 1552, 1553 (D.C. Cir. 1992) (Ginsburg, J.) ("[A] commercial landlord has a duty to take reasonable measures to safeguard tenants from foreseeable criminal conduct in the common areas of the leased premises."); *Kline v. 1500 Mass. Ave. Apartment Corp.*, 439 F.2d 477, 483 (D.C. Cir. 1970) ("[W]e find that there is a duty of protection owed by the landlord to the tenant in an urban multiple unit apartment dwelling."); *Lay v. Dworman*, 732 P.2d 455 (Okla. 1986) (holding that landlord has duty to use reasonable care to maintain common areas of the premises in such a manner as to insure that the likelihood of criminal activity was not unreasonably enhanced by the condition of those common premises); *Scott v. Watson*, 359 A.2d 548, 554 (Md. 1976) (holding that increased criminal activity in common areas imposes duty on landlord to take reasonable measures "to eliminate the conditions contributing to the criminal activity."); *Sharp v. W.H. Moore, Inc.*, 796 P.2d 506 (Idaho 1990) (holding landlord is under duty to exercise reasonable care to guard against criminal activity).

[25] *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82 (1980) ("[O]ne of the essential sticks in the bundle of property rights is the right to exclude others.").

live. It would be a perverse result if the Constitution forbade government as landlord from providing its tenants the same basic protections that tenants in the private sector often take for granted.[26]

As sovereign, government generally may not ban persons from public streets and sidewalks. *See City of Chicago v. Morales*, 527 U.S. 41, 64 (1999). However, as landlord, government may ban the general public from streets and sidewalks wholly within the housing complex, and it may exclude individuals who have engaged in misconduct in the past. As one federal circuit noted:

> The official mission of the Housing Authority is to provide safe housing for its residents, not to supply non-residents with a place to disseminate ideas. Further, in practice, access to Housing Authority property is carefully limited to lawful residents, their invited guests, and those conducting official business. We therefore have little difficulty concluding that the Housing Authority property is a nonpublic forum.

Daniel v. City of Tampa, 38 F.3d 546, 550 (11th Cir. 1994). *See also International Soc'y for Krishna Consciousness v. Lee,* 505 U.S. 672, 678 (1992) ("the government need not permit all forms of speech on property that it owns and controls.").

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[26] As the Supreme Court of Virginia has stated "[I]n operating and maintaining its housing project, the Authority assumes the role ordinarily occupied by a private landlord. . . . " *Virginia Elec. and Power Co. v. Hampton Redevelopment and Hous. Auth.*, 225 S.E.2d 364, 369 (Va. 1976) (holding that, in the operation and maintenance of a housing project, the Authority is not immune from liability for negligence).

As sovereign, government may not require prior approval of door-to-door solicitors. *See Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton,* 536 U.S. 150 (2002). Yet, as landlord, government may require solicitors to obtain permission before beginning their activities, as private landlords might in order to protect the safety of their tenants. *See City of Bremerton v. Widell*, 51 P.3d 733 (Wash.), *cert. denied*, 123 S.Ct. 497 (2002) (upholding conviction of persons barred from public housing project in absence of evidence showing invitation).

2. The Constitutional Distinction Between Sovereign and Landlord Does Not Imperil Individual Constitutional Rights.

Recognizing a distinction between sovereign and landlord need not mean that government as landlord has *carte blanche*, or that it may act in *all* respects like a landlord in the private sector. The restrictions imposed by the Constitution still have substantive meaning. The point is illustrated by *Southworth*, where a state university used a mandatory student fee to subsidize expression by private student groups.

Acting as sovereign, government may not force individuals to subsidize viewpoints with which they disagree. *See Keller v. State Bar of Cal.*, 496 U.S. 1, 13-14 (1990). However, in *Southworth,* this Court concluded that, when acting as educator, government may require such a subsidy in order to advance its educational mission. As the Court explained:

> The University may determine that its mission is well served if students have the means to engage

> in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall. If the University reaches this conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends.

Southworth, 529 U.S. at 233. While government, acting as educator, has more discretion, this Court emphasized that government still "must provide some protection to its students' First Amendment interests." *Id.* at 234. Specifically, this Court required that the subsidy be distributed among student organizations "with viewpoint neutrality as the operational principle". *Id.* Thus, even though the government as educator is given broader discretion, the First Amendment rights of individuals are protected.

When government acts as landlord, a similar approach should be followed. A public housing authority may determine that its mission is well-served if its tenants have protections analogous to those enjoyed by tenants in the private sector. Thus, it may require visitors to have a legitimate purpose; it may prohibit outsiders from wandering on its streets and sidewalks; and it may exclude individuals who have engaged in misconduct. It also may require outsiders wishing to leaflet to obtain permission "with viewpoint neutrality as the operational principle." *Id.* Such viewpoint neutrality means, for example, that it may not allow leafleting by Republicans, but prohibit leafleting by Democrats, nor may it allow leafleting by Christians, but not by Muslims. In the case at bar, there is no evidence that Ms. Rogers – or any other Housing Authority official – violated viewpoint neutrality. Nor is there any evidence that any request to leaflet was denied, delayed or subject to unreasonable conditions. As a

government landlord, the Housing Authority conducted itself in a manner that was entirely reasonable – and consistent with First Amendment rights.

3. The Streets and Sidewalks of Whitcomb Court Are Not a Traditional Public Forum.

The state supreme court expressly declined to decide whether the streets and sidewalks in Whitcomb Court are a traditional public forum. J.A. 166-67. Yet, it nevertheless used a mode of analysis that is reserved for traditional public fora, and thereby decided the issue implicitly – and incorrectly. Public forum analysis yields a result consistent with the distinction between sovereign and landlord, and confirms the Commonwealth's position that, as landlord, the Housing Authority's trespass policies are reasonable and constitutional.

For purposes of the First Amendment, this Court has recognized three distinct categories of government property: (1) traditional public fora, (2) designated public fora and (3) non-public fora. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). "Traditional" public fora include those places which "by long tradition or by government fiat have been devoted to assembly and debate." *Id.* at 45. A "designated" public forum "consists of public property which the State has opened for use *by the public* as a place for expressive activity." *Id.* at 45 (emphasis added). In order to be a designated public forum, the property must be open to "*indiscriminate* use by the general public." *Id.* at 47 (emphasis added). As the *Perry* Court explained:

> The mere fact that an instrumentality is used for the communication of ideas does not make a public forum. . . . Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities, immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require.

Perry, 460 U.S. at 49 n.9 (internal quotation marks and citations omitted). Finally, "non-public fora" include all other public property, that is to say all "[p]ublic property which is *not* by tradition or designation a forum for public communication. . . . " *Id.* at 46 (emphasis added).

In both traditional fora and designated fora, content-based regulations of citizen speech are subject to strict scrutiny. They will survive challenge only if "narrowly drawn to achieve a compelling state interest." *International Soc'y for Krishna Consciousness,* 505 U.S. at 678. By contrast, in a non-public forum, the strict scrutiny standard does not apply. Instead, "the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry*, 460 U.S. at 46.

While this Court has described streets and sidewalks as examples of traditional public fora, *id.*, it has also made it plain that there are exceptions. As the property of a public housing landlord, the streets and sidewalks of Whitcomb Court are akin to the postal sidewalks at issue in *United States v. Kokinda,* 497 U.S. 720 (1990), which the Court declined to treat as public fora. At issue in *Kokinda* was the validity of a regulation prohibiting solicitation of contributions and campaigning for election

on postal premises. Four Justices decided that a sidewalk leading from the post office parking lot to the door of the post office was not a public forum open to expressive activities. A fifth Justice decided that the public forum issue need not be reached and upheld the regulation on other grounds. All five agreed that not all sidewalks are public fora, even when they are open to the public. *Id.* at 728 (plurality); 497 U.S. at 738 (Kennedy, J., concurring in judgment). The plurality said that, "the *location* and *purpose* of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum." *Id.* at 729-30 (emphasis added).

In Whitcomb Court, both the location and purpose of the sidewalk where Hicks was found trespassing make it clear that it is *not* a public forum. First, the sidewalk is located entirely *within* Whitcomb Court. Second, the purpose of the sidewalk is not to serve the general public. Under the ordinance adopted by the City of Richmond, the streets within Whitcomb Court are "closed to public use and travel and abandoned" because they are "no longer needed for public convenience." J.A. 76. They exist for the convenience of Whitcomb Court residents, permitting easy access to and from the apartments by tenants and their guests. Unless someone is traveling to or from a location within Whitcomb Court – which is what Hicks said he was doing – there is simply no need to be there. Thus, using the *Kokinda* analysis, the street where Hicks was trespassing is not a public forum.

This result is strengthened by the factual analogies between *Kokinda* and the case at bar. In *Kokinda*, the sidewalks at issue were proprietary. They were part of a facility dedicated to providing an efficient and effective postal delivery system, and the expressive activities that

respondents proposed to conduct there – distributing political material and soliciting contributions – were found to be inherently disruptive of that purpose. Similarly, the sidewalks at Whitcomb Court are proprietary. They are part of a facility dedicated to providing safe and affordable housing to its tenants. Allowing the general public unregulated access to the streets and sidewalks of the apartment complex is disruptive of that purpose, especially given the real danger of violent crime, property damage and drug dealing that makes the quiet enjoyment of one's residence impossible. Just as the sidewalks in *Kokinda* are not a public forum, neither are the sidewalks at Whitcomb Court. Indeed, as a landlord of residential housing, the Housing Authority performs a role resembling the role of private entities, thereby making its property even less "public" in nature than property held by an agency performing the decidedly governmental function of providing postal service. *See* U.S. Const. Art. I, § 8.

Similarly, in *Greer v. Spock*, 424 U.S. 828 (1976), the Court upheld limitations on speech imposed on a military base, Fort Dix, New Jersey. This was not a base closed to the general public. Streets and footpaths running through the base were open to civilian traffic and commence. Even so, this Court ruled that there is no constitutional right to distribute political leaflets in areas open to the general public. The Court said it was "the business of a military installation like Fort Dix to train soldiers, not to provide a public forum." *Greer*, 424 U.S. at 838. By analogy, it is the business of a public housing complex to provide safe and affordable housing to its residents, not a forum for public debate. The political activists in *Greer* "had no generalized constitutional right to make political speeches or distribute leaflets at Fort Dix." *Id.* at 838. There is likewise no

generalized constitutional right to use the sidewalks inside Whitcomb Court as a public forum – either traditional or designated.

Whitcomb Court falls into the third category of government property. There is no evidence that the Housing Authority ever had a policy of making its property available to the public at large for purposes of particular speech. The property is dedicated to the limited purpose of providing safe and affordable housing to low income individuals and families. Its purpose is not to facilitate public discussion or debate of ideas and issues. Whitcomb Court is a non-public forum. And, therefore, it is the reasonableness standard – not strict scrutiny – that must be applied to determine whether its policies are constitutional. While the unwritten addendum deals with expressive conduct, that addendum is only an incidental part of a much broader trespass policy aimed at regulating conduct – not speech. The fact is that the Housing Authority's limited access policy, both the Legitimate Purpose rule and the Trespass-After-Warning rule, seek to regulate conduct – trespass by non-residents. In any event, the Authority's policy is constitutional because it is reasonable and, indeed, viewpoint neutral.

B. The Distinction Between Sovereign and Landlord Means That the State Supreme Court's Decision Must Be Reversed.

The constitutional distinction between sovereign and landlord provides additional reasons why the decision of the state supreme court must be reversed. In light of this distinction, none of the arguments advanced by Hicks can withstand scrutiny.

1. Banning Hicks from Whitcomb Court Does Not Violate His "Right to Wander" or "Right to Visit."

Although the state supreme court did not address the issue, Hicks argued below – and is likely to argue again – that he has a constitutional right to be present on the streets and sidewalks of Whitcomb Court, asserting in effect a "right to wander." It is an argument based on his mistaken view that the Housing Authority's streets and sidewalks are a traditional public forum. Whatever the right to wander may entail, it does not include wandering about a public housing project in defiance of the landlord.

Hicks also argued below that he has a right to enter Whitcomb Court in order to visit friends and relatives residing there, and that the Housing Authority may not tell him otherwise.[27] He is again mistaken. This Court has recognized that "the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights." *Board of Directors of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 545 (1987). But those results were reached in a different context. In the context of public housing, "[t]he Court has not extended constitutional protection to mere visitation with family members. . . . [An individual] has no fundamental right to visit his family members on [housing project] property." *Thompson v. Ashe*, 250 F.3d 399, 407 (6th Cir. 2001). Moreover, there is ample room for Hicks to

[27] Such visits would take him off Whitcomb Court's streets and sidewalks and into the yards and buildings of the housing project, which are certainly not a traditional public forum – even under Hicks' exaggerated view.

visit with friends and family in venues other than Whitcomb Court, and it is the landlord – not the sovereign – who has told Hicks he must stay away from the premises. Hicks' so-called "right to visit" – if any such right exists – must give way to reasonable regulations adopted by the Housing Authority for the protection of its tenants and property.

2. The Housing Authority Trespass Policy Does Not Violate the Overbreadth Doctrine.

a. The Overbreadth Doctrine Is Inapplicable When Government Acts as Landlord.

One consequence of the constitutional distinction between sovereign and landlord is that the overbreadth doctrine should not be available to challenge regulations and policies adopted by government as landlord. *See LeBaron v. Amtrak*, 69 F.3d 650, 659 (2nd Cir. 1995) (the overbreadth doctrine "has only been applied to the conduct of the government in its role as a regulator, not as a proprietor."). This is true for two reasons.

First, when government acts as landlord, it is unable to enact criminal statutes. All criminal statutes are the result of government acting as sovereign. The overbreadth doctrine exists largely because of the concern that individuals will refrain from constitutionally protected expression, due to a fear of prosecution. *Dombrowski*, 380 U.S. at 486. In other words, its purpose is to facilitate attacks on invalid legislation enacted by government acting as sovereign. Yet, if the enactment of a criminal statute is not at issue, then this justification for the overbreadth

doctrine disappears. It is true that the Housing Authority's policy ultimately depends on the ability of government as sovereign to enforce its criminal trespass statute. However, the trespass statute bans conduct – not speech – and the need for the Housing Authority to invoke the law is no different than the need for private landlords to do so in connection with their own trespass policies.

Second, when government acts as landlord, the reach of any policy is necessarily limited to the physical confines of the government's property. In contrast, statutes enacted by government as sovereign apply throughout the territory under the sovereign's control. Because a policy enacted by government as landlord is so limited in its reach, an individual can easily avoid the restriction by the simple expedient of avoiding the premises. Ample alternative means of communication are readily available. There is no need to invoke the overbreadth doctrine when the sweep of the policy is so limited.

To say that the overbreadth doctrine does not apply is not to say that government as landlord need not adhere to the First Amendment. "As applied" challenges remain available; however, it is inappropriate that a criminal trespasser be allowed to return defiantly to the property of a public housing project by purporting to vindicate the First Amendment rights of hypothetical third parties not before the Court.

b. The Unwritten Addendum Is Not Overbroad.

The overbreadth doctrine has *two* parts. One part addresses standing, while the other provides substantive rules for evaluating the constitutionality of a statute,

regulation or policy. Even if Hicks had standing to challenge the Housing Authority's policy, the substantive rules of overbreadth would not condemn it. In order for a policy to be invalid under the overbreadth doctrine, "the overbreadth . . . must not only be *real*, but *substantial* as well, judged in relation to the [policy's] plainly legitimate sweep." *Broadrick*, 413 U.S. at 615 (emphasis added). On both of these issues – whether overbreadth is real and whether it is substantial – the state supreme court erred.[28]

First, there is no real overbreadth. If the Whitcomb Court housing manager were acting as an agent for the government as sovereign, then her unwritten addendum requiring permission before leafleting would undoubtedly be invalid. *See Watchtower*, 122 S. Ct. at 2089. But, she was not acting for the sovereign. She was acting for the government in its capacity as a residential landlord, and therefore a different constitutional analysis applies.

The requirement that visitors wishing to leaflet obtain permission in advance is a reasonable precaution. It protects Whitcomb Court and its residents from drug dealers and other criminals seeking to circumvent the trespass policy by the convenient ruse of carrying a stack of leaflets onto the premises. So long as there is no showing of viewpoint discrimination, undue delay or burdensome conditions, the requirement that visitors seek

[28] Even if real and substantial overbreadth were found, the unwritten addendum should be severed, an analytical step the state supreme court overlooked. The overbreadth doctrine ought not be used to invalidate a law where the offending portion can be readily severed. *See, e.g., Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985).

permission before leafleting should be deemed constitutional. This Court has approved permit requirements for those engaging in protected First Amendment activity when it can be shown that the permit requirements deter wrongdoing. *See, e.g., Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002) (upholding a permit requirement aimed, in part, at preventing unlawful uses of a park and assuring financial accountability for damage caused by the event). In short, when the government acts as landlord, it can require non-residents who wish to leaflet to obtain permission before doing so. Therefore there is no real overbreadth. The unwritten addendum is constitutional.

Second, if there is real overbreadth, it is not substantial. Not every case of overbreadth is fatal. Before a policy can be invalidated under the overbreadth doctrine, any overbreadth must be *substantial*. *Broadrick*, 413 U.S. at 615. This rule applies with particular force where, as here, "conduct and not merely speech is involved." *Id.* Here, the state supreme court did not explain why it thought any perceived overbreadth met this criterion. Indeed, there is no basis for any such conclusion. The trespass policy was adopted because drug dealers were running rampant through the housing project. It is their activities – and the activities of others bent on illegitimate purposes – that the policy chiefly curtails. In contrast, any impact upon visitors who come to leaflet is minimal. As observed by the dissenting Justices below:

> [T]his is "the paradigmatic case of a [policy] whose legitimate reach dwarfs its arguably impermissible applications." *Ferber*, 458 U.S. at 773. "Whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick*, 413 U.S. at 615-16.

J.A. at 172 (Kinser, J., joined by Lemons, J., dissenting) (emendation in opinion below). To say that the Housing Authority's trespass policy is substantially overbroad is without merit. For this reason, too, the decision of the state supreme court represents a misguided application of the overbreadth doctrine. It should be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted,

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March 7, 2003

Supreme Court, U.S.
FILED
APR 4 2003
CLERK

No. 02-0371

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA

Petitioner,

v.

KEVIN LAMONT HICKS,

Respondent.

On Writ of Certiorari to the
Supreme Court of Virginia

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158 pp

QUESTION PRESENTED

Is a law that makes it a crime to be on city streets and sidewalks adjacent to public housing unless one can demonstrate, to a government official's satisfaction, that one has a "legitimate business or social purpose" to be there, unconstitutionally overbroad and vague?

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STATEMENT OF THE CASE

The City of Richmond prohibits non-residents from using numerous streets and sidewalks surrounding public housing in that city unless they can demonstrate, to the satisfaction of a government official or a police officer, a "legitimate business or social purpose" for being there. Kevin Lamont Hicks, whose mother and two children lived in the Whitcomb Court housing project, was arrested on three separate occasions for trespassing in Whitcomb Court. After his first arrest, he was notified that he was barred from returning to any public housing property, including the streets and sidewalks around Whitcomb Court and those around other housing projects in Richmond. In defense to his latest trespass charge, Hicks successfully argued that Richmond's trespass-barment policy is unconstitutional on its face because it gives government officials unfettered discretion to deny access to numerous streets and sidewalks throughout Richmond to anyone they think does not have a "legitimate" reason to be there.

1. Richmond's "Privatization" Of Public Streets.

The Richmond Redevelopment & Housing Authority ("Housing Authority"), an arm of the Richmond City government, operates 4,100 units of housing that serve over 12,000 residents, making it the largest public housing authority in Virginia. *See* <www.rrha.org/html.aboutintro.htm>. Until 1997, the streets and sidewalks adjacent to public housing in Richmond were directly owned by the City and were similar to all other streets in Richmond. J.A. 123. In 1997, the Richmond City Council conveyed numerous streets and sidewalks adjacent to the City's public housing projects to the Housing Authority. J.A. 122; *see also* note 2. Petitioner refers to these

streets as having been "privatized." *See, e.g.,* J.A. 86. However, the Housing Authority is a city government agency, and thus the streets are still owned by the government of the City of Richmond.

Whitcomb Court is located near the heart of downtown Richmond. *See* Map Lodged With Court by Respondent (located at K-6). The following streets adjacent to, or running through, Whitcomb Court were conveyed to the Housing Authority on July 25, 1997: Carmine Street, Bethel Street, Ambrose Street, Deforrest Street, blocks 2100-2300 of Sussex Street and blocks 2700-2800 of Magnolia Street. J.A. 81. Other than the designated blocks, Sussex and Magnolia Streets remain open to the public. J.A. 80. Petitioner asserts that none of the closed streets "continue[s] beyond the Housing Authority property to other parts of the city." Pet. Br. 5. Petitioner is incorrect. Sussex Street, which is "closed" only for the 2100-2300 block, continues past the Whitcomb Court housing project into "other parts of the city." J.A. 80; *see also* Map Lodged with Court by Respondent (located at K6).

After the conveyance, the Housing Authority erected "no trespassing" signs along the newly conveyed streets, stating:

NO TRESPASSING

PRIVATE PROPERTY

YOU ARE NOW ENTERING
PRIVATE PROPERTY AND
STREETS OWNED
BY RRHA.

UNAUTHORIZED PERSONS
WILL BE SUBJECT TO
ARREST AND PROSECUTION.

UNAUTHORIZED
VEHICLES WILL BE TOWED
AT OWNERS EXPENSE.

J.A. 154-155. The signs do not define "unauthorized persons" and do not state where someone may go to ask permission to walk on these streets and sidewalks.

Other than posting "no trespassing" signs, the Housing Authority made no physical changes to the streets and sidewalks adjacent to Whitcomb Court. J.A. 123. The streets are not barricaded or gated and remain open to vehicular traffic. *Id.* The City maintains utility and maintenance easements on these streets, and it has designated them as public highways for law enforcement purposes. J.A. 77. In addition, the Housing Authority stated in a publication to residents that its "privatization" of the streets would not cause "[d]isruption to the flow of traffic or services" and that "[s]chool buses, delivery trucks, and city service vehicles will be able to drive into" the streets of Whitcomb Court. J.A. 87.

Petitioner's brief in this Court asserts, without citation, that the "closed streets were those with no use other than to provide entrance and egress to the residential units on the property." Pet. Br. 5. That statement is contradicted by facts in this record and in the public record. For example, a public school, the Whitcomb Court Elementary School, is located at 2100 Sussex Street — one of the blocks of Sussex Street that has been "closed" to the public. *See* J.A. 80 (showing the symbol for a school); *see also* Map Lodged with Court by

Respondent. (showing the same symbol more clearly); <www.richmond.k12.va.us/schools/rpsredesign/es/Whitcomb/webpage1.html> (home page of Whitcomb Court Elementary School). Whitcomb Court Recreation Center, located at 2302 Carmine Street, another "privatized" street, serves as the polling place for Richmond residents in precinct 602, which includes voters who do not live in Whitcomb Court. *See* <www.sbe.state.va.us/VotRegServ/Polling_Place/PollingPlacecounty-city.asp>. In addition, a local Boys and Girls Club is located at the Whitcomb Court Recreation Center. *See* <www.bgcmr.org/html/joinclub/joinclub_location.htm>.[1]

2. The Trespass-Barment Policy.

The Housing Authority has authorized the Richmond police to enforce the trespass laws of Virginia on the deeded streets. J.A. 84. The Housing Authority has further authorized:

> each and every Richmond Police Department officer to serve notice, either orally or in writing, to any person who is found on Richmond Redevelopment and Housing Authority property when such person is not a resident, employee, or such person cannot demonstrate a legitimate business or social purpose for being on the premises. Such notice shall forbid the person from returning to the property. Finally, Richmond Redevelopment and Housing Authority authorizes

[1] The map on page 80 of the Joint Appendix shows a graphic of a park/playground on the corner of Carmine and Sussex Streets. That same graphic is reproduced more clearly both on the map lodged with the Court by petitioner and the map lodged with the Court by respondent. Petitioner has informed respondent that it does not believe the park exists, although it could not say if the park had ever existed, or when it had been removed.

> Richmond police officers to arrest any person for trespassing after such person, having been duly notified, either stays upon or returns to Richmond Redevelopment and Housing Authority property.

J.A. 84-85.

Gloria Rogers, the Housing Manager for Whitcomb Court, is the Housing Authority official responsible for implementing the trespass-barment policy at Whitcomb Court. J.A. 33-34. Non-residents wishing to visit Housing Authority property, including the streets and sidewalks adjacent to Whitcomb Court, must first obtain Rogers' permission or risk arrest for trespass. J.A. 155-156. The posted signs, however, do not inform the public that they may request that Rogers give them permission to enter the streets.

Rogers testified that she has authority to decide whether an individual or group may walk, meet, picket, leaflet, or gather for any purpose on the streets and sidewalks adjacent to Whitcomb Court. J.A. 22-41. She stated that she is unaware of any guidelines that limit her discretion. J.A. 35. Rogers explained her understanding of the trespass-barment policy as follows:

> Q. Here's the question: if the policeman stopped you, is it your policy that when the police sees someone who cannot demonstrate that they are either visiting a lawful residing resident or conducting legitimate business, that person is an unauthorized person?
>
> ROGERS: I would say so. Yes.

J.A. 30.

Q. You, as housing manager, gets [sic] to determine who is properly on that property or not. That's part of your job, isn't it?

ROGERS: I would say yes.

Q. And if someone is not properly, legitimately on your property, then you can say so to the police that that person is not authorized?

ROGERS: Correct. And they're not tenants.

Q. And the policy is at [R.R.H.A.] to enforce trespass laws against unauthorized people who are present on R.R.H.A. property.

ROGERS: Correct.

J.A. 34.

> ROGERS: . . . if a person is on the property and they're there for the right reasons, they haven't been barred, there are no problems. That church members can come, family can come on the property. That is no problem. A trespasser is a person that's been barred from the property, and there are certain reasons they have been barred and the trespass comes into enforcement at that time.

J.A. 22.

Rogers makes no exception for those wishing to engage in leafletting, proselytizing, protesting, or other expressive activity. She testified that sometimes she grants such speakers

permission to come on to the streets and sidewalks adjacent to Whitcomb Court and sometimes she does not:

> Q. Are you in a position — does your position enable you to tell people — to give people permission to come on and picket or demonstrate on housing community property?
>
> ROGERS: I'm not sure what you're asking. To picket? I've had people to call [sic] to pass out flyers, and asked to have church services. And these are things I'm used to. As far as picketing and stuff, I never had that so I'm not familiar with it.
>
> Q. Let's talk about what you're used to.
>
> ROGERS: Okay.
>
> Q. With situations such as those, people wanting to pass out flyers for example, or hold church related meetings, do they have to come to you for permission?
>
> ROGERS: Yes.
>
> Q. Then do you give permission?
>
> ROGERS: Depending on the circumstances, sometimes its [sic] granted, yes.
>
> Q. Sometimes you do and sometimes you don't?
>
> ROGERS: Correct.

J.A. 36-37.

Contrary to petitioner's assertion, Pet. Br. 7, Rogers has not added an "unwritten addendum" to the trespass-barment policy. Rogers never claimed to be following an unwritten policy of her own regarding leafletters or others wishing to engage in First Amendment activities. Rather, her testimony reveals that she is doing no more and no less than exercising the unfettered discretion granted to her under the trespass-barment policy.

3. The Facts Of This Case.

At the time of the events leading to his arrest, respondent Kevin Hicks did not live in the Whitcomb Court housing project, but his mother, his children, and his children's mother did. J.A. 70. Hicks was convicted of trespassing at Whitcomb Court in February 1998 and again in June 1998. J.A. 68. The record does not reveal where Hicks was when he was arrested for trespassing or what he was doing on those two occasions. On April 14, 1998, Rogers served Hicks with written notice that he was barred from all Housing Authority property, and that if he was "seen or caught on the premises, [he would] be subject to arrest by the police." J.A. 90. Thus, Hicks was not only barred from streets and sidewalks adjacent to Whitcomb Court, but also from entering all the other "privatized" streets and sidewalks adjacent to other housing projects.[2]

---

[2] The following ordinances purported to "close" streets and sidewalks adjacent to public housing: Ordinance No. 97-182-198 closed Raven Street, North of Ford Avenue, near the Mosby Court housing project; ordinance No. 97-183-99 closed the 2000-2200 Block of Creighton Road, Walcott Place and Bunch Place near the Creighton Court housing project; ordinance No. 97-292-293 closed Afton Avenue, between Lynhaven Avenue and Thaxton Street; ordinance No. 97-205-218 closed the 1600-1800 block of (continued...)

After receiving the barment notice, Hicks twice went to Rogers' office and asked for permission to enter the streets and sidewalks around Whitcomb Court. J.A. 125. His requests were denied. *Id.*[3] Petitioner asserts that there is "no evidence that Hicks ever availed himself of the written procedures by which such a request might be properly considered by the Housing Authority official charged with such decisions." Pet. Br. 9. However, there is also no evidence that Hicks was informed of any such procedures. Neither the barment notice he received nor the "no trespass" signs in Whitcomb Court explain that barred individuals may appeal their status in writing — indeed, petitioner can point to no document that explains how one can appeal a barment notice — and Rogers never testified that she informed Hicks that he could submit his appeal in writing.

On January 20, 1999, a Richmond police officer stopped Hicks while he was walking on Bethel Street, one of the "privatized" streets adjacent to Whitcomb Court, and issued a summons for trespass. J.A. 125.

In April 1999, Hicks was tried and convicted of trespass in Virginia district court. He appealed to the Circuit Court of

---

[2](...continued)
Harwood Street, the 1600-1800 block of Rosecrest Avenue, the 1500-1600 block of Lone Street, the 1700-1800 bock of Southlawn Avenue, and the 1600 block of Glenfield Avenue, near the Hillside Court housing project; ordinance 97-181-197 closed Carmine Street, Bethel Street, Ambrose Street, Deforrest Street, the 2100-2300 block of Sussex Street, and the 2700-2800 block of Magnolia Street near the Whitcomb Court housing project.

[3] Rogers' office is located on one of the "privatized" streets. Although Hicks was technically trespassing when he asked for permission to return, he was not arrested on either occasion. J.A. 39-40.

the City of Richmond, where he received a trial *de novo*. Before that trial, Hicks moved to dismiss the trespass charge on the ground that prohibiting the public from entering the streets surrounding Whitcomb Court violates both the Virginia and federal constitutions. In pursuing that motion, Hicks asked for documents that explained why he was barred. J.A. 11. The Housing Authority responded that it did not have to give an explanation because it could bar anyone for any reason:

> MR. JOHNSON BLANK (counsel for the Housing Authority). Judge, if I may, 18.2-119 is the trespass statute, and I think, Judge, you hit right on it. The trespass statute says that a landowner can ban anybody they want for whatever reason they want at anytime that they want to. And the Housing Authority objects to them having to produce documents in this case because they're irrelevant beyond the criminal statute.

J.A. 13.

Hicks's motion was denied. He was subsequently convicted of trespass and sentenced to 12 months in jail and fined $1,000, although both penalties were suspended. J.A. 94-95. Nonetheless, Hicks served a 12-month sentence because his conviction on the trespass charge violated the terms of the suspended sentences imposed on him for his previous trespass violations. J.A. 94-95.

Hicks appealed his conviction to the Virginia Court of Appeals, where he attacked the trespass policy on its face, arguing that it is unconstitutionally vague and overbroad. He also contended that the policy violated his right of freedom of association under the Virginia Constitution and the First and Fourteenth Amendments of the U.S. Constitution. A divided

panel of that court rejected his claims. J.A. 98. On rehearing *en banc*, the Virginia Court of Appeals reversed the panel, holding that streets and sidewalks are public fora and that the Housing Authority's exclusion of the public from these fora violated the First and Fourteenth Amendments. J.A. 121.

The Supreme Court of Virginia affirmed on overbreadth grounds. The court recognized that overbreadth is "strong medicine" to be used "sparingly," but nonetheless held that the Housing Authority's trespass policy was "overly broad" because it granted government officials unfettered discretion to determine who has a right to speak on city streets and sidewalks, in violation of the First Amendment. J.A. 160, 167. The court concluded that it did not need to decide the question whether the streets and sidewalks adjacent to public housing are public fora to find that the policy was overbroad on its face. J.A. 166-167. The court did not reach Hicks's arguments based on the Virginia Constitution.

Petitioner never argued below that Hicks lacked standing to challenge the trespass-barment policy as overbroad because he had not been engaged in expressive activity. In addition, petitioner never asserted that the Housing Authority had greater authority to restrict First Amendment rights when acting as landlord than when acting as sovereign. Both of these arguments were raised for the first time in the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

Virginia law prohibits non-residents from entering numerous streets and sidewalks unless they can demonstrate a "legitimate business or social purpose" for doing so. The law does not define the types of activities that are considered "legitimate" or describe how an individual would demonstrate his or her legitimate purpose to the Housing Authority's or police officer's satisfaction. Neither the Housing Authority nor the police has established any standards to clarify who may enter the streets in question. Because this sweeping trespass-barment policy gives government officials and the police unfettered discretion to decide who may have access to streets and sidewalks throughout the City of Richmond, it suffers from the closely related defects of overbreadth and vagueness, and thus is unconstitutional on its face.

Streets and sidewalks are quintessential public fora. Like the streets and sidewalks throughout the rest of Richmond, those adjacent to Whitcomb Court continue to provide access to homes, and to public spaces such as a school and polling place, and serve as a space for public displays and association. Contrary to petitioner's assertion, the City's transfer of the streets and sidewalks to the Housing Authority did not automatically transform these public fora into nonpublic fora, or give the Housing Authority special authority to ignore constitutional restraints on government action. The Housing Authority is no more the "landlord" of streets and sidewalks around public housing than the City is "landlord" of the rest of the streets and sidewalks in Richmond. Nor is the Housing Authority in a lessor/lessee relationship with the individuals it bars from Housing Authority property. Thus, the Housing Authority has no greater authority than does the City of

Richmond to prohibit the public from being on the streets and sidewalks adjoining its property.

In any case, the trespass-barment policy is overbroad whether analyzed under strict scrutiny as a public fora or the reasonableness standard that applies to nonpublic fora. Concern over criminal activity on the streets around housing projects does not justify giving public housing officials and police unfettered discretion to decide who has a "legitimate purpose" to enter these streets and who will be barred or arrested for doing so. Excluding everyone without a "legitimate purpose" from numerous neighborhoods, whether or not suspected of current criminal activity, is not a "narrowly tailored" or even "reasonable" method of combating crime.

Contrary to the assertions of petitioner and the United States, Hicks has standing to defend against a charge of trespass on First Amendment overbreadth grounds. Petitioner seeks to limit overbreadth challenges to those engaged in expressive, but not constitutionally protected, activity. As a threshold matter, petitioner waived the issue because it did not question Hicks's prudential standing to challenge the law as overbroad in the courts below. For that reason, there is very little evidence in the record regarding Hicks's activities at the time of his arrest, and none explaining why he was barred. The evidence that does exist indicates that Hicks was trying to communicate with his family, which is expressive activity that gives him standing to bring an overbreadth challenge under even petitioner's standard.

In any event, petitioner's novel restriction on overbreadth challenges is at odds with the purpose of the overbreadth doctrine, which is to benefit third parties not before the Court, and is unworkable because almost every imaginable

human activity — including Hicks's activities at the time of his arrest — is "expressive" in one way or another. *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). Furthermore, this case arose in a state court, and state courts are not required to adhere to prudential limitations on standing applicable in federal courts.

The United States, but not petitioner, argues that overbreadth challenges can be brought only against laws that target speech or expressive conduct, and not against laws that target conduct more generally. Adopting this new limiting principle would require overruling this Court's prior decisions holding that laws that target conduct, but nonetheless substantially restrict speech, are overbroad. In any case, the restriction is unnecessary to curtail overbreadth challenges. As the law stands now, for an overbreadth challenge to be successful, the purported overbreadth must be "not only real, but substantial as well, judged in relation to the law's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). This limitation is sufficient to ensure that the only laws that will be held unconstitutionally overbroad are those that have a significant chilling effect on speech. Because the trespass-barment policy threatens with arrest anyone who does not first obtain the government's approval for using streets and sidewalks around public housing, it meets this standard.

ARGUMENT

I. THE TRESPASS-BARMENT POLICY IS UNCONSTITUTIONAL BECAUSE IT GRANTS THE HOUSING AUTHORITY AND THE POLICE UNBOUNDED DISCRETION TO CHOOSE WHO MAY HAVE ACCESS TO STREETS AND SIDEWALKS.

The trespass-barment is both overbroad, in violation of the First Amendment, and vague, in violation of due process, because it grants Housing Authority officials and the police unfettered discretion to decide who has a "legitimate purpose" to use streets and sidewalks.

A. The Trespass-Barment Policy Is Substantially Overbroad.

The Housing Authority's trespass-barment policy is overbroad because it "reaches a substantial amount of constitutionally protected conduct." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982). The policy flatly excludes the public from numerous streets, making exceptions only for residents and those whom the police and Housing Authority officials decide have a "legitimate business or social purpose" for being there. The trespass-barment policy applies to all individuals, including those who seek to engage in First Amendment activity on the streets and sidewalks at issue, and Gloria Rogers, housing manager for Whitcomb Court, testified that she applies the policy to individuals seeking to engage in First Amendment activity. J.A. 37-38. In essence, the policy gives government officials and police unchecked authority to prohibit any and all speech and expression by non-

residents on streets and sidewalks near public housing projects in Richmond.

In determining whether a law is overbroad, "a court should evaluate the ambiguous as well as the unambiguous scope of the enactment. To this extent, the vagueness of a law affects overbreadth analysis." *Hoffman Estates*, 455 U.S. at 494 n.6. Unclear laws and policies suppress protected expression in two ways. First, they chill speech and expressive conduct that might, or might not, fall within the scope of the law because "ambiguous meanings cause citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Id.* (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (internal quotation marks and citation omitted)). Second, broadly-worded prohibitions empower government decisionmakers to pick and choose among speakers based on their personal preferences, leading to "selective enforcement against unpopular causes." *NAACP v. Button*, 371 U.S. 415, 435 (1963). The trespass-barment policy exhibits both flaws.

Under the policy, no one can know in advance whether the police or Housing Authority will deem any particular purpose to be legitimate. Faced with the possibility of arrest and prosecution for trespass if they guess wrong, many leafletters, proselytizers, demonstrators, canvassers, and the like will be dissuaded from risking criminal penalties for entering any of the posted streets. *See Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972) (overbreadth challenges "deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression"). "[W]here a [policy] unquestionably attaches sanctions to protected conduct, the likelihood that the

[policy] will deter that conduct is ordinarily sufficiently great to justify an overbreadth attack." *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 n.19 (1984).

To avoid the possibility of arrest for trespass and banishment from all Housing Authority property, non-residents must first obtain permission from Housing Authority officials before entering posted streets and sidewalks. J.A. 155-156. The inherent ambiguity of the "legitimate purpose" standard gives government officials free rein to decide who may use streets and sidewalks, and therefore may lead to the suppression of speech disfavored by these officials. For example, Rogers explained that she decides who has a legitimate reason to be on the streets on a case-by-case basis, and she testified that she has denied permission in the past to those seeking to engage in First Amendment-protected activity. J.A. 37. She also could not identify any factors or guidelines that ensure that her determination is objective. J.A. 35.

This Court has consistently stated that laws "that delegate[] standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights" are unconstitutionally overbroad. *Broadrick*, 413 U.S. at 613; *see also Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Cox v. Louisiana*, 379 U.S. 536, 551-558 (1965); *Kunz v. New York*, 340 U.S. 290 (1951); *Lovell v. Griffin*, 303 U.S. 444 (1938). In *Shuttlesworth*, the Court struck down a Birmingham, Alabama ordinance because it gave similar unbridled discretion to city officials to determine who could obtain a permit to hold a demonstration on city streets. Birmingham officials could grant or deny permits based solely on their view of the "public welfare, peace, safety, health, decency, good order, morals or convenience." *Shuttlesworth*, 394 U.S. at 149. The Court declared that "a law

subjecting First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Id.* at 150-151. The Housing Authority's trespass-barment policy, like the Birmingham ordinance at issue in *Shuttlesworth*, is unconstitutional because it establishes a similar prior restraint on speech by allowing government officials to pick and choose the content of speech and conduct that will be permitted on the streets. *See also Board of Airport Comm'rs of Los Angeles v. Jews for Jesus,* 482 U.S. 569, 576 (1987).

The United States asserts that "there is no reason to believe that the challenged trespass policy has any impact at all on expressive activity or that anyone seeking to engage in such activity on Whitcomb Court property has ever been denied permission to do so." U.S. Br. 8. However, Rogers testified that church groups and leafletters have asked to enter the streets, and that she has, on occasion, denied them permission to do so. J.A. 37. When questioned about whether she allows people to enter Whitcomb Court to pass out fliers or hold church related meetings, she responded that "[d]epending on the circumstances, sometimes [permission] is granted." When Hicks's counsel asked her as a follow up question: "Sometimes you do [grant permission] and sometimes you don't?," Rogers responded, "Correct." J.A. 37.

The United States finds Rogers' testimony unclear on this point. U.S. Br. 17 n.5. We disagree in light of the unambiguous testimony quoted above. But in any case, the power to bar speakers from using a public forum, whether or not it is exercised, has an unconstitutional chilling effect on speech. *See, e.g., Watchtower Bible and Tract Soc'y of New York v. Village of Stratton*, 536 U.S. 150, 156 (2002) (striking down permitting scheme even though no one had ever been denied a permit). "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very

existence that constitutes the danger to freedom of discussion." *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

Moreover, petitioner did not argue below that the policy is narrower than it appears to be, or that Rogers and other Housing Officials have anything less than complete discretion to decide who may, and who may not, access those streets and sidewalks. To the contrary, petitioner asserted below that it was free to deny anyone and everyone access to its "private" property for any reason. J.A. 13. Thus, even if Rogers had not already exercised that authority to deny speakers access — as she testified she has done — the written policy, on its face, has a substantial impact on speech that is more than sufficient to raise a "realistic danger that the [policy] itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Taxpayers for Vincent*, 466 U.S. at 801.

Finally, the "mere fact that the [policy] covers so much speech raises constitutional concerns." *Watchtower*, 536 S. Ct. at 165. In striking down the much narrower ordinance at issue in *Watchtower*, which required only that individuals obtain a permit before engaging in door to door advocacy, this Court stated:

> It is offensive — not only to the values protected by the First Amendment, but to the very notion of a free society –- that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so. Even if the issuance of permits by the mayor's office is a ministerial task that is performed promptly and at no cost to the applicant, a law requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition.

Id at 165-166.

The scope of Richmond's trespass-barment policy extends far beyond that of the ordinance in *Watchtower*. In Richmond, citizens cannot even walk onto a neighboring street without first obtaining government permission. As a result, public housing neighborhoods are effectively isolated from the civic life of the community by a law that threatens with arrest and banishment any non-resident who walks on the sidewalk without first obtaining permission. Because the trespass-barment policy's sweeping restriction on speech and association substantially impinges on constitutionally protected conduct and expression, it should be struck down as overbroad.

B. The Trespass-Barment Policy Is Void For Vagueness.[4]

For many of the same reasons that the trespass-barment is overbroad, it is also unconstitutionally vague. Because of the extraordinary discretion granted to Housing Authority officials and the police to decide who has a "legitimate" reason to be on streets adjacent to public housing, the policy fails to define the criminal offense with sufficient clarity to provide an ordinary person with notice of the prohibited conduct and, more importantly, fails "to establish minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (internal quotation marks and citation omitted). Where

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[4] The Virginia Supreme Court decided this case on overbreadth grounds alone. However, vagueness was raised by Hicks below, and the relevant facts are not in dispute. In addition, "vagueness and overbreadth" are "logically related and similar doctrines." *Kolender v. Lawson*, 461 U.S. 352, 358-59 n.8 (1983); *see also Keyishian v. Board of Regents*, 385 U.S. 589, 609 (1967); *Button*, 371 U.S. at 433. Thus, this Court may resolve this case on vagueness grounds. *See Chicago v. Morales*, 527 U.S. 41, 52-53 (2001) (plurality) (reaching overbreadth challenge even though Illinois Supreme Court had decided case solely on vagueness grounds); *cf. Hoffman Estates*, 455 U.S. at 495-96 (resolving overbreadth challenge even though court of appeals had decided case solely on vagueness grounds).

such minimal guidelines are lacking, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors and juries to pursue their personal predilections." *Id.* (internal quotation marks and citation omitted).

The lack of clarity is particularly problematic because the trespass-barment policy inhibits the exercise of constitutionally protected rights. *See Smith v. Goguen*, 415 U.S. 566, 573 (1974). Not only does the law suppress the exercise of First Amendment rights of speech and association, it also affects the fundamental right to associate with one's family and "implicates consideration of the constitutional right to freedom of movement." *Kolender*, 461 U.S. at 358; *see also Chicago v. Morales*, No. 97-1121, Br. for the U.S. as Amicus Curiae, 1998 WL 331132, *23 ("[U]nder the Due Process Clause, individuals in this country have significant liberty interests in standing on sidewalks and in other public places, and in traveling, moving and associating with others."); *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987) (discussing First Amendment right to communicate with family).

Under the trespass-barment policy, police and Housing Authority officials exercise extraordinary, and unchecked, authority over members of the public. For example, any individual found on the streets of Whitcomb Court can be stopped by the police and questioned about his or her purpose for being there. J.A. 26, 29-30. If, in the officer's opinion, the purpose is not "legitimate," the officer may then give oral or written notice that the individual is barred, indefinitely, from all Housing Authority property. J.A. 84. Housing Authority officials such as Rogers also have unchecked authority to issue notices barring members of the public. An individual who is barred, such as Hicks, is prohibited not only from returning to the streets around the public housing project at which he was stopped, but also from entering many other streets and

sidewalks adjacent to public housing throughout Richmond. *See* J.A. 84; *see also* note 2 (listing "closed" streets around housing projects in Richmond). Once barred, the individual may not enter the streets for any purpose, even when invited there as the guest of a relative living in the housing project. J.A. 39. Thus, a barred individual such as Hicks would risk arrest for trespass if he returned to the "privatized" streets to pick up his children from the Whitcomb Court Elementary School or from the local Boys & Girls Club, or if he went to vote at the polling place located at the Whitcomb Recreation Center. *See supra* 3-4. Because this policy "grant[s] a policeman virtually standardless discretion to close off major portions of the city to an innocent person" it constitutes "a major . . . limitation upon the free state of nature." *Morales*, 527 U.S. at 70 (Breyer, J., concurring) (quotation and citation omitted).

Access to the streets around Whitcomb Court is granted or denied on the police or Rogers' whim. Rogers testified that "if a person is on the property and they're there for the *right reasons*, they haven't be[en] barred, there are no problems." J.A. 22 (emphasis added). Rogers did not define what she meant as the "right reasons" for being on the streets, although she did state that "church members can come, family can come on the property. That is no problem." J.A. 22. Obviously, however, even those minimal standards are not consistently followed, because Hicks himself was barred even though his children and mother lived at Whitcomb Court. The Constitution does not permit government officials to grant or deny access to streets and sidewalks based on such vaguely defined and subjective criteria.

The vaguely worded trespass-barment policy closely resembles the standardless anti-loitering ordinances that repeatedly have been struck down on vagueness grounds by this Court. *See, e.g., Morales,* 527 U.S. 41; *Kolender*, 461 U.S. 352; *Coates v. City of Cincinnati*, 402 U.S. 611 (1971). Most recently, in *Morales*, the Court invalidated for vagueness an ordinance that made it a crime to "loiter" in the company of someone a police officer reasonably believed was a criminal street gang member and to refuse to disperse when ordered to do so by the police. 527 U.S. at 47. Loitering was defined as "remain[ing] in one place with no apparent purpose." *Id.* The Court found that definition "inherently subjective because its application depends on whether some purpose is 'apparent' to the officer on the scene." *Id.* at 62.

Obvious parallels exist between the ordinance at issue in *Morales* and the Housing Authority's trespass-barment policy. Like that ordinance, the trespass-barment policy requires police and housing authorities to engage in the "inherently subjective" determination of whether someone has a "legitimate business or social purpose" to be on the property. *Morales*, 527 U.S. at 62. As was the case with the ordinance struck down in *Morales*, the trespass-barment policy is not limited to those persons who have "an apparently harmful purpose" or who are "reasonably believed to be criminal[s]." *Morales*, 527 U.S. at 62. In fact, the trespass-barment policy has fewer limitations than did the ordinance in *Morales*, which at least required that the loiterer be in the presence of an individual believed to be a gang member before he or she could be ordered to leave.

Similarly, the statute struck down in *Kolender* required that people found loitering on the streets provide "credible and reliable" identification and account for their presence when requested to do so by a police officer. If they refused, they could be arrested. The Court concluded that, because the statute "contains no standard for determining what a suspect has to do in order to satisfy the requirement to provide a 'credible and reliable' identification," it "vests virtually complete discretion in the hands of the police to determine

whether the suspect has satisfied the statute . . . ." 461 U.S. at 358. Likewise, the trespass-barment policy gives the Housing Authority and the police unchecked authority to decide who will be told to leave the streets, who will be barred from returning, and who will be arrested for trespass. The official need not provide an explanation or create a record to memorialize the basis for the decision. Consistent with this practice, nothing in this record reveals where Hicks was when he was first charged with trespass or why he was barred. Neither of those issues was even relevant to his "crime" under the policy. J.A. 13 (claiming that Housing Authority officials can "ban anybody they want for whatever reason they want at anytime that they want to").

In *Coates*, 402 U.S. 611, the Court invalidated an ordinance that made it a criminal offense for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by . . . ." *Id.* at 611. The Court held that the ordinance was unconstitutionally vague, explaining that "[c]onduct that annoys some people does not annoy others." *Id.* at 614. Similarly, where one official might find distributing leaflets to be a "legitimate" reason to be on the streets of Whitcomb, another might consider that illegitimate and thus an act of trespass.

Like the laws at issue in *Morales*, *Kolender*, and *Coates*, the trespass-barment policy is void for vagueness because, under it, "a person may stand on a public sidewalk in [Richmond] only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstration.'" *Morales*, 527 U.S. at 59 n.29 (plurality) (quoting *Shuttlesworth v. Birmingham*, 382 U.S. 87, 90 (1965)).

II. THE CONSTITUTIONAL FLAWS OF THE TRESPASS-BARMENT POLICY ARE NOT CURED BY THE CITY'S CONVEYANCE OF STREETS TO THE HOUSING AUTHORITY.

Petitioner does not dispute that the trespass-barment policy would be unconstitutional if applied to streets and sidewalks throughout Richmond. Pet. Br. 36, 37. Rather, petitioner argues that the policy is constitutional because the streets and sidewalks around public housing in Richmond have been transformed into nonpublic fora over which the Housing Authority is "landlord."

Regardless of the nature of the forum, the trespass-barment policy is unconstitutional because it is vague and because it gives unbridled discretion to government officials to decide whom to enforce it against. But in any case, the act of transferring streets from one government entity to another does not, by itself, transform streets and sidewalks from public to nonpublic fora, or free the Housing Authority from constitutional limits on government action. The Housing Authority argues that it has greater constitutional leeway to regulate streets in its capacity as "landlord." But the Housing Authority is not "landlord" over streets and sidewalks near public housing any more than the City is "landlord" over the rest of the streets of Richmond, nor does the Housing Authority have a lessor-lessee relationship with those it seeks to exclude. Thus, the Housing Authority is subject to the same constitutional restrictions as any other government entity when establishing policies regarding public access to streets and sidewalks. Finally, even if the deeding of streets somehow altered their status, the sweeping trespass-barment policy is an unreasonable method of combating crime around public housing and cannot withstand even the lower level of constitutional scrutiny reserved for nonpublic fora.

A. Richmond's Conveyance Of The Streets And Sidewalks Around Public Housing To The Housing Authority Does Not Transform These Residential Streets Into Nonpublic Fora Or Free The Housing Authority From Constitutional Restraints On Government Action.

Streets and sidewalks are "the archetype of a traditional public forum." *Frisby v. Schultz,* 487 U.S. 474, 480 (1988). As this Court explained in *United States v. Grace*, 461 U.S. 171 (1983), streets and sidewalks are presumed to be public fora:

> Sidewalks, of course, are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property.

Id. at 179; *see also Carey v. Brown*, 447 U.S. 455, 460-61 (1980); *Hague v. CIO*, 307 U.S. 496, 515 (1939) (Roberts, J.).

Presumably, petitioner believes that the streets at issue here cannot be equated with the streets throughout the rest of Richmond because they have been transferred to the Housing Authority, and because they have been "closed" to the public. Pet. Br. 6. However, petitioner has presented no evidence that would rebut the presumption that the streets and sidewalks around Whitcomb Court and other public housing projects in Richmond are still used for the same purposes as the rest of the streets throughout Richmond, and thus share the same status as public fora subject to full First Amendment protection.

Petitioner states, incorrectly, that the "closed streets were those with no use other than to provide entrance and egress to the residential units on the property." Pet. Br. 5; *see also id.* at 45. The "closed" streets surrounding Whitcomb

Court are not only the entryways to residences, but, as noted above, *see supra* 3-4, also lead to a public school, a Boys and Girls' Club, and a polling location, all of which are visited by non-residents (such as parents, teachers, children, volunteers, voters and polling workers). *See* J.A. 80; Map Lodged with Court by Respondent (K-6).

Moreover, even purely residential streets serve as more than means of physical access to the homes on those streets. Just as a "public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood," *Frisby,* 487 U.S. at 480, a public street does not lose that status simply because it runs through a public housing project, let alone along side of it. Streets and sidewalks are among a city's most important public spaces. *See, e.g.,* Eric A. Cesnik, "The American Street," 33 Urb. Law. 147, 147 (2001). They "constitute not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people enjoy the open air or the company of friends and neighbors in a relaxed environment." *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981). The public uses streets and sidewalks every day to walk, jog, visit neighbors, solicit business, canvass, protest, march, and assemble for various reasons. Petitioner's narrow view of the purpose of the streets of Whitcomb Court reflects its fundamental misunderstanding of the role of streets and sidewalks in American civic life.

True, in rare cases, sidewalks and streets are considered nonpublic fora because of their unusual characteristics. For example, in *Greer v. Spock*, 424 U.S. 828 (1976), the streets and sidewalks at issue were located within an enclosed military installation and were thus separated from the streets and sidewalks of the surrounding municipality. *Id.* at 830; *see also Grace*, 461 U.S. at 179 (noting that distinction). The Court concluded that the normal presumption that streets are public

fora does not apply to a military installation, where the commanding officer has the "historically unquestioned power" to "summarily [] exclude civilians from the area of his command." 424 U.S. at 838. Likewise, in *United States v. Kokinda*, 497 U.S. 720 (1990), the sidewalk at issue ran only from a post office parking lot to the post office itself, and "was constructed solely to assist postal patrons to negotiate the space between the parking lot and the front door of the post office, not to facilitate the daily commerce and life of the neighborhood or city." *Id.* at 728. Thus, four members of this Court concluded that this walkway was not the "quintessential public sidewalk which we addressed in *Frisby v. Schultz*, 487 U.S. 474 (1988) (residential sidewalk)." *Id.* at 727-728. These two cases, where the streets and sidewalks served atypical purposes, are the exceptions that prove the general rule that streets and sidewalks are public fora from which the public cannot be excluded.

Petitioner argues that the City of Richmond's conveyance of the streets and sidewalks to the Housing Authority transforms the Housing Authority into "landlord" of these spaces and then contends that the government is subject to fewer constitutional restrictions when acting as landlord than when acting as sovereign. Pet. Br. 32-49. In making this argument, petitioner cites this Court's decision in *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125 (2002), which held that the government could enforce a lease term permitting eviction of tenants from public housing if illegal drugs were found in their residence. The very passage quoted by petitioner from *Rucker* makes clear that the government's leeway to set lease-terms does not create a right to regulate the general population, as the Housing Authority is doing here:

> The government is not attempting to criminally punish or civilly regulate respondents as members of the general populace. It is instead acting as a landlord of property that it owns, invoking a clause in a lease to which respondents have agreed and which Congress has expressly required.

Id. at 135.

Here, the government *is* "attempting to criminally punish" respondent Hicks in his status as member of the "general populace." Hicks is not in a contractual relationship with the Housing Authority; he is a member of the public who, like everyone else, is prohibited from entering the streets adjacent to public housing unless the Housing Authority decides that he has a "legitimate business or social purpose" to do so.

The Housing Authority is not the "landlord" of the streets and sidewalks the City deeded to it any more than the City can claim "landlord" status over the rest of the streets of Richmond. In addition, the trespass-barment policy, by definition, does not apply to residents, and so the Housing Authority is not in a lessor/lessee relationship with anyone charged with trespassing on those streets. Thus, the Housing Authority has no more leeway under the Constitution to pick and choose who may walk on the streets around public housing in Richmond than the City has to apply the same restrictions to any of the other streets and sidewalks in Richmond.

Petitioner draws comparisons to the private sector, and argues that landlords of private apartment projects may require that visitors have a legitimate purpose for coming on the property. Pet. Br. 34-35. Of course, petitioner is a government agency, not a private actor, and thus it is limited by the Constitution in ways that private owners are not. In any case, petitioner can point to no example of a private apartment owner being allowed to exclude the public from numerous streets and sidewalks throughout a city, including streets leading to a public school and polling place, as the Housing Authority has

attempted to do. Although private owners have more leeway in some circumstances to restrict access to their property, they, like the government, cannot restrict access to spaces, such as streets and sidewalks, that are used by the general public. So, for example, in *Marsh v. State of Alabama*, 326 U.S. 501 (1946), the Court held that the corporate owner of a "company town" could not pick and choose who could walk on streets and sidewalks:

> Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statute and constitutional rights of those who use it.

Id. at 505-07. As *Marsh* suggests, the most important question is not who owns the streets and sidewalks at issue, but rather the purpose they serve. As demonstrated above, the streets and sidewalks around public housing serve the same purpose as any other street and sidewalk in Richmond, and thus the Housing Authority must comply with all of the constitutional restraints when it seeks to bar the public from using them.

The United States cites three factors that it thinks should be considered in determining whether streets and sidewalks are public fora, U.S. Br. 29, all of which support the conclusion that the streets around Whitcomb Court are public fora.

First, the United States asserts that the Court should look to whether the sidewalk and streets in question are, as a practical matter, closed to the public. U.S. Br. 29. The answer to that question here is no. No physical barriers separate the streets from the rest of the neighborhood. Even under the new trespass-barment policy, anyone with a "legitimate purpose" may enter those streets and sidewalks. Moreover, there are many reasons that non-residents would enter the streets of Whitcomb Court. According to the pamphlet the Housing

Authority provided to Whitcomb Court residents, "[s]chool buses, delivery trucks, and city service vehicles" are free to enter the purportedly "privatized" streets. J.A. 87. Parents, teachers, employees, and volunteers regularly have reason to use the "closed" streets around Whitcomb Court to enter the public school, the Boys and Girls Club, or the polling place. *See supra* 3-4.

Second, according to the United States, a court should consider whether the government has taken sufficient steps to make its closure of streets clear to the public. J.A. 29. Again, the Housing Authority has not satisfied that standard. Other than posting "no trespassing" signs, the Housing Authority has taken no steps to separate the streets and sidewalks adjacent to Whitcomb Court from the open streets around surrounding it. J.A. 123. "No trespassing" signs alone cannot transform public streets into non-public streets, for that would be no different than simply allowing the government to deem a street closed to the public without otherwise altering its physical form, which this Court has held insufficient to oust First Amendment protections. *See Grace*, 461 U.S. at 180. The government "cannot foreclose the exercise of constitutional rights by mere labels." *Button*, 371 U.S. at 429.

The government's third factor is whether the purpose served by the sidewalks and streets at issue is consistent with a finding that they have become a nonpublic forum. J.A. 29. The purpose of the sidewalks and streets around Whitcomb Court remains what it has always been: to serve as a pathway to the homes, school, polling place, and other facilities located on those streets, as well as a space for community life. *See supra* 3-4. The *only* change is that now members of the public are trespassers unless they can demonstrate to the police and Housing Authority's satisfaction that they have a "legitimate" purpose to be there. Because this is the very policy whose constitutionality is at issue, it cannot serve as the change in

purpose that would justify itself. In short, city government may not, by its "own *ipse dixit* destroy the 'public forum' status of streets and parks which have historically been public forums." *Grace*, 461 U.S. at 180 (quoting *U.S. Postal Service v Greenburgh Civic Assns.*, 453 U.S. 114, 133 (1981)).

As well as listing the three factors, the United States declares:

> Vesting a gatekeeper at a public park with discretion to permit or deny entry based on the gatekeeper's determination whether a person has an otherwise unspecified valid purpose would likely run afoul of this Court's public forum cases. But no case of this Court suggests that vesting an official at a publicly owned office building or apartment complex with discretion to determine whether a visitor seeks entry for a valid business or social purpose would violate the First Amendment.

U.S. Br. 25.

Even if the United States is correct in principle, that principle does not apply here. This case does not concern the Housing Authority's right to prohibit the public from entering the Whitcomb Court *residences*. At issue here is the Housing Authority's application of the trespass-barment policy to streets and sidewalks adjacent to the property, which, for all the reasons give above, are public fora.[5]

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[5] Both the United States and petitioner cite *Daniel v. City of Tampa*, 38 F.3d 546, 550 (11th Cir. 1994), to support their contention that Richmond can bar the public from entering streets and sidewalks around housing projects. *See* U.S. Br. 25; Pet. Br. 36. However, in *Daniel*, the Eleventh Circuit upheld Tampa's trespass policy because, "[a]lthough access to the Housing Authority property is limited, the City-owned streets and sidewalks (continued...)

B. The Trespass-Barment Policy Is Unreasonable.

Because the streets and sidewalks around public housing are public fora, the public cannot be prohibited from entering them unless the government establishes a narrowly tailored restriction on access that is necessary to achieve a compelling governmental interest and the restriction "leave[s] open ample alternative channels of communication." *Frisby* 487 U.S. at 481 (internal quotation marks and citation omitted). The sweeping restriction on public access to these streets and sidewalks, which includes a restriction on First Amendment-protected expression, does not come close to meeting this standard, and thus is facially overbroad. *Cf. Kokinda*, 497 U.S. at 738-39 (Kennedy, J., concurring) (upholding ban on solicitation because public allowed to engage all other types of speech and expression). But even if the City's transfer of streets around public housing to the Housing Authority somehow transformed these streets into a nonpublic forum, the

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[5](...continued)
surrounding and intersecting with the Housing Authority property are open to the public." *Id.* at 548 n.3. The court specifically noted that the "police are trained not to arrest someone who confines himself to the City-owned streets and sidewalks surrounding the Housing Authority property." *Id.* at 550 n.9.

Petitioner also claims that *City of Bremerton v. Widell*, 51 P.3d 733 (Wash. 2002) and *Thompson v. Ashe*, 250 F.3d 399 (6th Cir. 2001), support the conclusion that the trespass-barment policy is constitutional. Pet. Br. 37, 44. The trespass policies at issue in those cases are far narrower than the policy at issue here. The policy in *Widell* applies only to the "common grounds" of government-owned housing and barred only those individuals who engaged in a list of prohibited activities (fighting, making loud noise, etc.). The policy in *Thompson* applies only to individuals who are suspected of being involved in criminal activities and who enter the residential property itself, rather than the streets adjacent to that property. Thus, *Daniel*, *Widell* and *Thompson* serve only to demonstrate that the Housing Authority in Richmond has adopted a policy of unprecedented breadth.

trespass-barment policy would still be unconstitutionally overbroad because it is not "reasonable in light of the purpose served by the forum." *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985). "[C]onsideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved." *Kokinda*, 492 U.S. at 732 (internal quotation marks omitted).

As already discussed, the streets at issue here, even after their purported "privatization," serve many purposes, all amenable to the exercise of speech and association. Indeed, the streets have a far broader purpose than did the Los Angeles Airport ("LAX"), where this Court struck down a ban on First Amendment activity because the ban "cannot be justified even if LAX were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition on speech." *Jews for Jesus*, 482 U.S. at 575. Likewise, even if the streets and sidewalks around public housing in Richmond are considered to be nonpublic fora, no government interest could justify the granting of unchecked authority to Housing Authority officials to decide who may or may not use streets and sidewalks. *See Arkansas Ed. Television Comm'n v. Forbes*, 523 U.S. 666, 682 (1998) (even in nonpublic forum, government cannot exercise "unfettered power to exclude"); *see also International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 687 (1999) (same) (O'Connor, J., concurring).

In any event, the Housing Authority has provided almost no evidence of what purpose it hoped the trespass-barment policy would serve, or why it gave its officials free rein to decide who may enter those streets and who may not. The only document in the record discussing the purpose of the

policy is the pamphlet the Housing Authority provides to residents. J.A. 87; Pet. Br. 4 n.2. None of the goals listed in the pamphlet justifies granting Housing Authority officials authority to decide who may use streets adjacent to public housing.[6]

The pamphlet declares that the "goal" of street privatization is:

> [1] To make communities safer by removing persons who commit unlawful acts which destroy the peaceful enjoyment of other residents.
>
> [2] To ensure that children have places to play free of drug paraphernalia and the danger of gunshots and other criminal activity.
>
> [3] To provide an opportunity for residents to develop safety initiatives in their community, such as resident patrols, social security number property identification, neighborhood watch, etc.

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[6] The record contains no evidence of the City of Richmond's purpose in deeding the streets to the Housing Authority, or any contemporaneous evidence of the Housing Authority's goals in establishing the trespass-barment policy. Although the record contains Rogers' impression that the policy was adopted to prevent drug dealing in the neighborhood, J.A. 45-46, Rogers did not purport to speak for the City of Richmond, and there is no evidence that she played any role in the adoption of the trespass-barment policy. The absence of record evidence is in sharp contrast with the well-developed record attempting, albeit unsuccessfully, to justify the anti-loitering policy at issue in *Morales*. 527 U.S. at 46-47; *see also Watchtower*, 536 U.S. at 169 (Breyer, J., concurring) (rejecting the Village of Stratton's crime-prevention justification for anti-canvassing ordinance because Stratton failed to present any evidence to justify it on those grounds).

> [4] To hold households who knowingly harbor persons who engage in criminal activity accountable.

J.A. 87.

The policy is an extreme, unreasonable, and grossly overinclusive method by which to accomplish the first stated goal of "removing persons who commit unlawful acts" from the streets and sidewalks around public housing projects. Independent of the trespass-barment policy, the police have authority under other, narrower laws to arrest anyone engaged in illegal activity. *See, e.g.,* Va. St. 18.2-248 (crime to manufacture, sell, or possess controlled substance); Va. St. 18.2-58 (crime to commit robbery). Thus, Richmond did not need to bar anyone the government decides does not have a "legitimate" business or social purpose. *See, e.g., Watchtower*, 536 U.S. at 164-169 (ordinance prohibiting canvassers from going on private property to explain or promote "cause" without a permit is far broader than necessary to protect the Village's interest in protecting privacy of its residents and preventing fraud).

Nor did Richmond need to bar the public from all streets and sidewalks adjacent to public housing to achieve its second goal of providing children with places to play that are free from drugs and crime. Again, the Housing Authority could rely on Virginia's laws penalizing criminal activity to accomplish this purpose, or the City could adopt more narrowly focused laws targeted at persons engaged in criminal or gang activity. *See, e.g., Morales*, 527 U.S. at 67-68 (O'Connor, J., concurring).

Richmond's third goal — providing "an opportunity for residents to develop safety initiatives in their community" — has no relation at all to the trespass-barment policy. Residents

may organize neighborhood watch or other crime prevention programs in their communities regardless of whether the streets in their community have been "privatized."

Finally, the fourth goal of holding accountable those households that "harbor criminals" is entirely unconnected to the trespass-barment policy. The trespass-barment policy only allows the police to arrest and ban "unauthorized" individuals; it does not give the Housing Authority or police any greater power to penalize households that "harbor" criminals than it exercised beforehand. In any case, federal law already provides housing authorities with the right to evict anyone whose guest engages in "any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises" or "drug-related criminal activity on or off [federally assisted low-income housing] premises." 42 U.S.C. § 1437d(*l*)(6); *see also Rucker*, 535 U.S. 125

In *Kolender* and *Morales*, the government contended that it needed "strengthened law enforcement tools to combat the epidemic of crime that plagues our Nation." *Kolender*, 461 U.S. at 361; *see also Morales*, 527 U.S. at 47. In both cases, this Court explained that law enforcement needs "cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity." *Id.*; *see also Morales*, 527 U.S. at 64. Likewise, the purported purposes of the trespass-barment policy do not free petitioner from the requirement that its policies provide "sufficiently specific limits on the enforcement discretion of the police to meet constitutional standards of definiteness and clarity." *Morales*, 527 U.S. at 64 (internal quotation marks and citation omitted).

III. HICKS HAS STANDING TO CHALLENGE THE TRESPASS-BARMENT POLICY ON ITS FACE.

Petitioner and the United States devote much of their briefs to the question whether Hicks has standing to challenge the trespass-barment policy as constitutionally overbroad in violation of the First Amendment. If this Court agrees with Hicks that the law is void for vagueness in violation of the due process clause, it need not decide this issue. In addition, as we explained in our opposition to certiorari, petitioner waived this question by failing to raise it at any point below.

Moreover, as a threshold matter, this Court has no warrant to regulate the prudential limitations on standing established by the Virginia Supreme Court. This Court has loosened prudential limits on standing in federal courts in the First Amendment context because it recognizes that the mere existence of laws impinging on First Amendment activities will, even when applied only to those engaged in unprotected activities, have a chilling effect on the speech rights of others. *Brŏadrick*, 413 U.S. at 612. If this case arose in a federal court, then this Court could consider whether to restrict overbreadth challenges to those engaged in expressive activity. But those constraints should not be imposed on the states. As Justice Stevens has explained, "if a state court has reached the merits of a constitutional claim, 'invoking prudential limitations on [the respondent's] assertion of *jus tertii* would serve no functional purpose'" because "state courts need not apply prudential notions of standing created by this Court." *Morales*, 527 U.S. at 55 n.22 (plurality) (quoting *Revere v. Massachusetts Gen. Hospital*, 463 U.S. 239, 243 (1983)); *see also Raines v. Byrd*, 521 U.S. 811, 823 (1997) (interest that state court deemed sufficient to confer standing to raise federal claim sufficient for this Court to review state court's resolution

of merits of claim) (citing *Coleman v. Miller*, 307 U.S. 433, 446 (1939)).[7]

A. Petitioner Waived The Question Whether Hicks Has Standing To Bring An Overbreadth Challenge.

Petitioner has waived these nonjurisdictional standing issues by failing to raise them at any point below. *See, e.g., Sprietsma v. Mercury Marine*, 123 S. Ct. 518, 522 n.4 (2002). Petitioner responded to Hicks's overbreadth challenge in the trial court, twice in the Virginia Court of Appeals, and then in the Virginia Supreme Court. Not once did petitioner argue that Hicks lacked standing to make an overbreadth challenge because he was not engaged in expressive activity or because he was challenging an "unwritten addendum" to the trespass-barment policy that had not been applied to him. Instead, petitioner argued that "Hicks has not demonstrated a substantial

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[7] Petitioner also contends that Hicks's conduct "was not proscribed by that portion of the [policy] he challenges as overbroad." Pet. Br. i. Petitioner argues that Rogers invented an "unwritten addendum" to the policy, under which "visitors who wish to engage in leafleting must obtain her permission before doing so." Pet. Br. 7. Thus, petitioner claims that Hicks cannot challenge the "unwritten addendum" as overbroad because it was not applied to him.

On the contrary, Hicks is challenging the trespass-barment policy, which is the very policy that was applied to him and that is applied to anyone else who enters the "privatized" streets adjacent to Whitcomb Court, including those wishing to engage in speech protected by the First Amendment. Petitioner has no basis for claiming that Rogers invented a separate policy for those wishing to engage in First Amendment activities at Whitcomb Court. Petitioner cannot point to anything in Rogers' testimony that suggests she was applying some different policy to First Amendment speakers than she applied to anyone else, or that she considered herself to be doing anything but faithfully applying the trespass-barment policy to all who sought access to the streets and sidewalks of Whitcomb Court.

risk that enforcement of the policy will lead to the suppression of speech." Va. S. Ct. Br. 22 (internal quotation marks omitted), a position that it does not press in this Court.[8]

Moreover, petitioner's waiver imposes a particular hardship on Hicks and, ultimately, this Court. Petitioner's failure to raise the issue below prevented Hicks from presenting any evidence regarding his conduct at the time of his arrests for trespass or the reasons why he was barred from returning. Petitioner states "there is nothing to suggest that expressive activity was involved in [Hicks's] barment from Whitcomb Court, nor is there any suggestion that his previous convictions" for trespass "were related to any expressive activity." Pet. Br. 19. Any absence of evidence on these issues is *petitioner's* fault for not raising the issue below.

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[8] In his opposition to the petition for a writ of certiorari, Hicks argued that petitioner had waived the issues in both its questions presented by failing to raise them at any time below. Opp. Cert. at 5-6. In its reply, petitioner argued that it had raised these issues, although it did not cite to any portion of any brief in which it made these arguments. Pet. Rep. to Opp. Cert. 2. Petitioner then wrote: "Indeed, the majority opinion [of the Virginia Supreme Court] explicitly acknowledges that Petitioner argued 'Hicks is not entitled to challenge the constitutional validity of the Housing Authority's practices or policies in the criminal prosecution for trespass.' *See* App. at 7." *Id.* Petitioner's use of that quote is extremely misleading. The quoted sentence refers to petitioner's unsuccessful argument below that Hicks should not have been permitted to raise overbreadth as a defense to trespass because he failed to challenge the barment notice in a separate, civil proceeding. J.A. 157-58; *see also* Cert. Pet. App. 7. Petitioner does not raise that argument here, and it is entirely unrelated to its standing arguments in this Court. The fact remains that petitioner *never* raised its standing arguments in any of its briefs below.

As petitioner admits, Pet. Br. 24-25, this Court has never limited overbreadth challenges to those engaged in expressive conduct, and thus Hicks had no reason to think that his conduct was relevant to his facial challenge to the trespass-barment policy. For its part, petitioner never presented *any* evidence regarding Hicks's activities at the time of the earlier trespassing charges, and it never explained why Rogers decided to bar Hicks from the numerous streets and sidewalks adjacent to public housing in Richmond. To the contrary, petitioner objected when Hicks's counsel attempted to obtain information about why Hicks was arrested and barred, arguing that such information was "irrelevant" because the Housing Authority, like all landowners, "can ban anybody they want for whatever reason they want at anytime that they want to." J.A. 11-13.[9]

---

[9] Although the record is nonexistant regarding Hicks's activities at the times of his first two arrests for trespassing and the reasons for his barment, there is some evidence that, at the time of Hicks most recent arrest, he was trying to visit his family. *See* J.A. 67-68. Virginia claims that an individual has standing to challenge a law as overbroad as long as the challenger is engaged in expressive activity, even if that expressive activity is not constitutionally protected. Pet. Br. 29. Communication with family members *is* expressive activity, and is constitutionally protected. *Board of Directors of Rotary Int.*, 481 U.S. at 545 (The "First Amendment protects those relationships, including family relationships, that presuppose deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.") (internal quotation marks and citation omitted); *cf. Watchtower*, 536 U.S. at 166 (ordinance requiring people to obtain a permit before "speak[ing] to [their] neighbors" violates First Amendment). Thus, the little evidence that exists in this record supports the proposition that Hicks satisfies Virginia's new, and previously unasserted, condition on standing.

B. Hicks Need Not Have Been Engaged In Expressive Conduct To Have Standing To Bring An Overbreadth Challenge.

This Court's precedents establish that Hicks need not be engaged in expressive conduct himself to raise the First Amendment rights of others. For example, in *Morales*, the plurality considered defendants' overbreadth challenge to Chicago's anti-loitering law, even though defendants had not been engaged in any expressive activity at the time of their arrest for loitering. *Morales*, 527 U.S. at 52-53 (plurality). Although the plurality ultimately concluded that the anti-loitering ordinance was not overbroad because it did not apply to First Amendment activities, it conducted the overbreadth analysis without ever suggesting that defendants lacked standing to raise this issue.

Beyond *Morales*, none of the Court's overbreadth decisions turns on the identity of the challenger. So, for example, nothing in this Court's decision in *Watchtower* suggests that although Jehovah's Witnesses could challenge the anti-canvassing and solicitation policy, the Girl Scouts or trick-or-treaters could not. *See Watchtower* Oral Argument Tr., 2002 WL 341775, *28, *51-52 (Feb. 26, 2002) (discussing whether ordinance applies to these groups). The "crucial issues" for standing to bring an overbreadth challenge are whether the challenger "satisfies the requirement of 'injury-in-fact' and whether it can be expected satisfactorily to frame the issues in the case," *not* whether the challenger was engaged in expressive activity. *Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 958 (1984). This Court has made clear that the challenger's activities are not relevant in overbreadth challenges, because "[w]here regulations of the liberty of free discussion are concerned, there are special

reasons for observing the rule that it is the statute, and *not the accusation or the evidence under it*, which prescribes the limits of permissible conduct and warns against transgression." *Thornhill*, 310 U.S. at 98 (emphasis added).

Moreover, petitioner's proposed limitation on overbreadth challenges is at odds with that doctrine's purpose. "Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society — to prevent the statute from chilling the First Amendment rights of other parties not before the court." *Munson*, 467 U.S. at 958. Overbreadth challenges protect not only the rights of speakers, but also the public's interest in access to information and ideas. *See* Richard Fallon, "As Applied and Facial Challenges and Third-Party Standing," 113 Harv. L. Rev. 1321, 1367 (2000). As this Court explained in *Eisenstadt v. Baird*, 405 U.S. 428 (1972), "in First Amendment cases we have relaxed our rules of standing *without regard to the relationship between the litigant and those whose rights he seeks to assert* precisely because application of those rules would have an intolerable, inhibitory effect on freedom of speech." *Id.* at 445 n.5 (emphasis added); *see also Broadrick*, 413 U.S. at 612; *Gooding*, 405 U.S. at 520-21. In short, the very reason for permitting overbreadth challenges is to enable parties whose activity is *not* protected by the First Amendment to challenge laws on the ground that they have a chilling effect on the First Amendment rights of others and suppress valued speech; indeed, the Court has suggested that *only* one whose conduct is unprotected may bring a facial overbreadth challenge. *See Brockett v. Spokane Arcades*, 472 U.S. 491, 503-04 (1985); *see also Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977) ("The use of overbreadth analysis reflects the conclusion that the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the

possibility that protected speech will be muted."). Requiring a nexus between the challenger's conduct and the law's unconstitutional application is thus inconsistent with the doctrine's prophylactic purpose.

Furthermore, this Court has already established significant limitations on overbreadth challenges that are in accord with the doctrine's purpose to protect the speech rights of third parties. Overbreadth challenges can only be successfully brought against laws that have a "*substantial* impact on conduct protected by the First Amendment," because only such laws have a significant chilling effect on constitutionally-protected activity. *Morales*, 527 U.S. at 52-53 (plurality) (emphasis added). Applying overbreadth only when a substantial amount of speech is affected is far more in keeping with the purpose of the doctrine than is a rule requiring that the person challenging the law be engaged in expressive speech.

Petitioner's proposal would limit standing in overbreadth challenges to the odd category of cases in which the challenger is engaging in expressive conduct that is *not* protected by the First Amendment. Pet. Br. 29. Under petitioner's rule, an individual who wishes to display his pornography collection on the streets of Whitcomb Court has "standing" to challenge the trespass-barment policy, while someone like Hicks, whose children lived at Whitcomb Court, does not. The Constitution does not recognize any distinction between expressive conduct that is *not* protected by the First Amendment and conduct that is simply not expressive, *see Chaplinski v. New Hampshire*, 315 U.S. 568, 572 (1942), and, for the reasons already given, it makes no sense to do so.

Petitioner's proposed limitation on standing is not just illogical, it is unworkable because it would require courts and

parties to resolve a complicated factual question — *i.e.*, whether the party's conduct was "expressive" — that is entirely separate from, and irrelevant to, the question whether the law is overbroad. Petitioner assumes that it would be a simple matter to determine whether an individual is engaged in expressive activity. However, as this Court has noted, "[i]t is possible to find some kernel of expression in almost every activity a person undertakes — for example, walking down the street or meeting one's friends at a shopping mall. . . ." *Stanglin*, 490 U.S. at 25.

Indeed, the slim evidence in this record suggests that Hicks was seeking to communicate with his family, *see* J.A. 67-68, which is surely expressive activity. *See supra* note 9. Moreover, Hicks knew he was barred from Whitcomb Court, but returned anyway, possibly because he disagreed with the policy that kept him from visiting his family. Thus, he could argue that simply by walking down the street, he was expressing his objection to the trespass-barment policy. Presumably, petitioner would agree that if Hicks had carried a sign, or wore a t-shirt, that said "I object to the Housing Authority's trespass-barment policy," he would have "standing" to challenge the law as overbroad. Courts and parties should not be required to delve into the difficult and entirely irrelevant question whether a party's conduct was "expressive" before concluding that the party has standing to challenge a law as overbroad.

Finally, limiting standing to those engaged in expressive (but not constitutionally protected) activity would not accomplish the goals that petitioner and the United States claim it would. The United States asserts that the "costs of a challenge like respondent's are more substantial than in an ordinary overbreadth case" because it "will disable society from

enforcing its laws even against those engaged in no expressive activity at all." U.S. Br. 8, *see also* 15-16. Whether or not Hicks had been engaged in expressive conduct at the time of his arrest for trespass, however, his challenge, if successful, would prevent petitioner from enforcing its trespass-barment policy against *anyone*, including those not engaged in expressive activity, because a "successful overbreadth challenge . . . suspends enforcement of a statute entirely." *Munson*, 467 U.S. at 977 (Rehnquist, C.J., dissenting). For example, if Rogers barred a musician or dancer from entering the streets of Whitcomb Court, and that person then brought a successful overbreadth challenge to the trespass-barment policy, the would thereafter be unenforceable against *anyone*, including those not engaging in expressive activity.

The United States also criticizes the application of the overbreadth doctrine to cases such as this on the ground that it will lead to courts "prematurely" deciding constitutional questions. U.S. Br. 16-17. But overbreadth challenges are never "premature" in the Article III sense — that is, they are ripe cases for a court to review, as here, where Hicks was charged with a crime as a result of the policy. True, the overbreadth doctrine leads courts to decide whether a law is unconstitutional earlier than they would otherwise have done, but that is the very reason this doctrine exists. The Court loosened prudential restrictions on standing in the First Amendment context to strike down sooner, rather than later, laws that will have a chilling effect on speech.

In a variation on petitioner's theme, the United States also suggests limiting overbreadth to laws that solely target expression. U.S. Br. 17-21. Not only was this issue *never* raised below, it is also not fairly included within the question presented and it is *still* not pressed by petitioner here. Thus, the

issue should not be addressed by this Court. *See United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981) (refusing to address an argument raised only by *amicus*).

Moreover, such a limitation would require overruling the long line of cases in which this Court has applied overbreadth analysis to laws that apply generally to both speech and conduct. *See Morales*, 527 U.S. at 52-53 (plurality), *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992) (requiring groups to obtain a permit before gathering at public places); *Houston v. Hill*, 482 U.S. 451, 478-481 (1987) (concluding that ordinance that makes it a crime to "oppose, molest, abuse or interrupt any policeman" applies to unprotected conduct as well as protected speech, but nonetheless violates the First Amendment and Fourteenth amendments on its face) (Powell, J., concurring); *see also id.* at 472 (Scalia, J., concurring); *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972) ("our cases firmly establish appellant's right to raise an overbreadth challenge" to anti-noise ordinance prohibiting making of noise that breaches the peace near a public school); *Broadrick*, 413 U.S. at 615 (noting that overbreadth challenges can be brought against state laws regulating expressive and unexpressive conduct); *Coates*, 402 U.S. at 615 (concluding that a law that prohibits three or more people from assembling and conducting themselves in a manner annoying to others is overbroad as well as vague because it applies, in part, to conduct protected by the First Amendment).

The United States argues that the law at issue in *Forsyth County*, which required groups to obtain a permit before using public spaces, actually targeted expression because "[g]atherings of people in a public forum are a characteristic of expressive activity and a traditional function of public parks and streets." U.S. Br. 19-20. But if that is so, the trespass-

barment policy that prevents *anyone* — whether in large groups or as individuals — from "gathering" on streets must also target speech. Individuals as well as groups engage in expressive activity. And, of course, the policy that forbids individuals to be on the streets of Whitcomb Court also, by definition, forbids groups from being there as well. Perhaps the United States is suggesting that had Forsyth County chosen to regulate *everyone's* access to streets — individuals as well as groups — that ordinance could not have been challenged on overbreadth grounds. Yet it would be anomalous, and wholly at odds with the overbreadth doctrine's purpose, for this Court to allow individuals to challenge *narrow* laws that target speech as overbroad, while refusing to allow individuals to challenge far *broader* laws that target conduct as well as speech as overbroad.

The United States is concerned that overbreadth not be used to strike down broad laws aimed at non-expressive conduct that have little impact on First Amendment protected activity. However, existing limitations on the overbreadth doctrine put that fear to rest. For overbreadth challenges to be successful, the challenged law's impact on protected expressive conduct must "not only be real, but substantial as well, *judged in relation to the statute's plainly legitimate sweep*." *Broadrick*, 413 U.S. at 615 (emphasis added). This limitation ensures that broadly sweeping laws that do not impinge significantly on speech in relation to their affect on constitutionally unprotected conduct will not be struck down as overbroad. Because the trespass-barment policy threatens with arrest anyone who does not first obtain the government's approval for using streets and sidewalks around public housing, it meets this standard.

CONCLUSION

For the reasons stated above, this Court should affirm the Supreme Court of Virginia's holding that the trespass-barment policy is facially unconstitutional.

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April 4, 2003

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GRANTED

Supreme Court, U.S.
FILED
APR 23 2003
OFFICE OF THE CLERK

No. 02-371

In The
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

KEVIN LAMONT HICKS,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Virginia

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REPLY BRIEF OF PETITIONER

The Commonwealth of Virginia submits this brief in reply to the arguments of Respondent.

ARGUMENT

I. HICKS MISREADS THE RECORD.

The respondent, Kevin Lamont Hicks, bases much of his case on assertions not supported by the record, including the following misstatements:

A. Hicks misunderstands the legal status of the Housing Authority, erroneously describing it as an "arm" and "agency" of the City of Richmond and attributing to the City actions by the Housing Authority. *See*, *e.g.*, Resp. Br. at 1, 2. The Housing Authority – like other housing authorities in Virginia – is a separate political subdivision of the Commonwealth. Va. Code § 36-19. Housing authorities have narrow powers. They are authorized to "operate housing projects" and perform other housing and redevelopment functions. *Id*. They have no authority to enact laws regulating the general populace.

B. Hicks mischaracterizes the location of the streets and sidewalks at issue, describing them as "around" or "adjacent to" Whitcomb Court. *See, e.g.*, Resp. Br. at 1. Such descriptions are inaccurate. As the Supreme Court of Virginia explained, "Bethel Street [where Hicks trespassed] . . . is located *entirely within* Whitcomb Court." J.A. 156 (emphasis added). Elsewhere, the court describes the privatized streets as being "in" Whitcomb Court. J.A. 154; *see also* J.A. 79 and 80 (street plan).

C. As Hicks notes, two streets (Sussex and Magnolia) enter Whitcomb Court from the outside. Resp. Br. at 2. But he misses the point. They do not come out on the other side and cannot be used as thoroughfares. He also notes that the closed streets were designated by the City as "highways for law enforcement purposes." Resp. Br. at 3. But he ignores the state statute under which the City acted. *See* J.A. 78. Intended to promote traffic safety, the

statute applies only to "private roads, within any [large] residential development." Va. Code § 46.2-1307.

D. Hicks says the streets of Whitcomb Court "lead to a public school." Resp. Br. at 27. This is misleading. There is a public school at the corner of Sussex Street (which is closed) and Whitcomb Street (which remains open).[1] Surely, the City may regulate access to one of its schools by closing a side street bordering its premises. The school remains accessible from Whitcomb Street.

E. Hicks goes outside the record to contend that the privatized streets lead to a Boys and Girls Club that meets in the "Whitcomb Court Recreation Center." Resp. Br. at 4, 27. But there is no allegation that the club serves anyone other than children living in this public housing complex. *Id.* In any event, the Housing Authority's role as host to a group of children – and its interest in their safety – make it *more* important to exclude outsiders with no legitimate purpose.

F. Hicks again goes outside the record to argue that the Whitcomb Court Recreation Center serves as a polling place. The point is irrelevant. Many polling places in Virginia are located in privately owned buildings, but that does not transform their premises into public fora.[2]

G. Hicks misstates the nature of the Housing Authority trespass policy, grossly exaggerating its scope and failing to distinguish between its various parts. For example, Hicks says "[the] trespass-barment policy threatens with arrest *anyone* who does not *first obtain* the government's approval for using streets and sidewalks around public

[1] The map Hicks lodged with the Court shows a park bordering Whitcomb Court just north of the school; however, as he apparently concedes, the map is wrong. Resp. Br. at 4, n.1. There is no park there and Hicks' arguments do not mention it. Tiwari Aff. ¶5 (lodged April 21, 2003).

[2] Polling places in Richmond include eighteen houses of worship, three nursing homes, a Masonic lodge, and two privately owned apartment complexes. *See* http://www.sbe.state.va.us (selecting "Voter Registration," then "Voter Registration again, then "Precinct Statistics and Polling Places Locations").

housing . . ." Resp. Br. at 14 (emphasis added). This is simply not so. First, the policy does not restrict *residents* at all. It affects only outsiders. J.A. 84, 86. Second, *visitors* are also unaffected if they are invited by a resident (and have not been barred). J.A. 87. *No one* is barred unless he has come to Whitcomb Court without a legitimate purpose. *See* Commonwealth's Brief ("Com. Br.") at 20 (explaining Legitimate Purpose rule); J.A. 27-28 (explaining that illegal drugs and domestic violence are reasons for barment). *No one* is arrested unless he returns (or refuses to leave) after having been previously barred. *See* Com. Br. at 20 (explaining Trespass-After-Warning rule).

H. The Whitcomb Court housing manager, Gloria Rogers, has applied an unwritten addendum in order to ascertain in advance whether leafleting by a visitor is legitimate. *See* Com. Br. at 7. Hicks exaggerates her role.[3] Ms. Rogers said she sometimes does not give permission to people wanting to pass out flyers. Resp. Br. at 7 (quoting J.A. 36-37). But, this must be read in context. As Ms. Rogers also explained, she has *never* turned anyone down. J.A. 38. If she sees something she is not comfortable approving, *she* does not give permission, but refers the matter to her supervisor. *Id.* There is no evidence that her supervisor ever turned anyone down.

I. Hicks insinuates that he did not know about the written procedures for appealing a barment notice. J.A. 36. Yet, as Ms. Rogers testified, she explains that procedure when someone comes to her seeking permission to return. *Id.* At trial, Hicks complained about wanting to see his child, but there is no evidence he said anything about the child when he asked Ms. Rogers to lift his barment, never mentioning that the mother lives in Whitcomb Court. J.A. 40.

[3] In discussing who may enter Whitcomb Court, Hicks says that Ms. Rogers is "unaware of any guidelines that limit her discretion." Resp. Br. at 5 (citing J.A. 35). This misreads the record. Ms. Rogers' comments at J.A. 35 refer to *lifting* a barment, not imposing one. *See* J.A. 34.

J. Hicks says the record does not reveal *where* he was or *what* he was doing in the two previous trespass offenses. Resp. Br. at 8.[4] He is mistaken. Although Hicks did not challenge the individual basis for his barment,[5] the summonses for these two offenses are in the trial court record. *See* Record, pp. 1 and 2. He was charged with "Trespassing of RRHA property" – at 2341 Carmine Street and at 2200 Deforrest Street. Both addresses are inside Whitcomb Court. *See* J.A. 75, 79. The summonses also show he pleaded *guilty* to each charge, thereby precluding any argument that the previous charges were ill-founded. Record, pp. 1 and 2. Hicks also ignores his 1998 conviction for damaging property at Whitcomb Court. J.A. at 124-25.

II. THE COURT SHOULD PLACE LIMITS ON OVERBREADTH STANDING.

The first issue here is whether the state supreme court erred by allowing Hicks to invoke the First Amendment overbreadth doctrine. Yet, Hicks gives the issue scant attention, failing to address key points made by the Commonwealth.

First, Hicks does not cite a single case – from any court – where an individual not engaged in expressive activity was allowed to pursue an overbreadth challenge.[6]

[4] Hicks says the Commonwealth objected when his counsel "attempted to obtain information about why [he] was [previously] arrested and barred." Resp. Br. at 41. This is misleading. The objection was not raised by the Commonwealth at trial, but by counsel for the Housing Authority in a pre-trial discovery proceeding. The objection was not sustained. Hicks' discovery request was granted. J.A. at 13-14.

[5] The point is *not* that Hicks did not challenge his individual barment in a "separate, civil proceeding." Resp. Br. at 40. The point is that he did not challenge it *at all*, not in a separate proceeding, and not as a defense to the trespass charge.

[6] Hicks asserts that, in *City of Chicago v. Morales*, 527 U.S. 41 (1999), a plurality of this Court allowed individuals to bring an overbreadth challenge even though they had not engaged in expressive conduct. *See* Resp. Br. at 42. The assertion is incorrect. The plurality stated "we do not rely on the overbreadth doctrine." *Id.* at 53 (plurality

(Continued on following page)

See Com. Br. at 28-31 (showing that the Commonwealth's proposed bright-line rule is consistent with this Court's previous overbreadth decisions); United States Br. at 14 ("All of this Court's overbreadth cases have involved parties who engaged in, or who sought to engage in, expressive activity subject to the challenged regulation.").

Second, Hicks does not challenge the Commonwealth's view that the state supreme court's expansion of the overbreadth doctrine leads to extreme results and effectively prevents government agencies from protecting their property against trespass and related threats. *See* Com. Br. at 22-24; Amici States Br. at 12-19.

Third, Hicks does not address the Commonwealth's position that a defendant charged with violating one provision of a statute, regulation, or policy should not be permitted to challenge the constitutionality of a different provision. *See* Com. Br. at 24-25, 30. The Trespass-After-Warning rule and criminal statute that Hicks violated are fundamentally different from the unwritten "leafleting" addendum that he successfully challenged as unconstitutional. Hicks glosses over this discrepancy and fails to address the issue of severability. *See* Com. Br. at 47 n.28.

A. There Must Be Limitations on Overbreadth Standing.

The Commonwealth and United States have explained why overbreadth standing should be limited to persons engaged in expressive conduct. *See* Com. Br. at 16-25; United States Br. at 17-21.[7] Hicks apparently believes that

opinion). Since the plurality invalidated the measure on grounds other than overbreadth, *Morales* did not hold, even implicitly, that persons not engaging in expression may bring overbreadth challenges.

[7] In a variation on this theme, the United States also argues that overbreadth challenges may not be brought to statutes of general applicability absent a claim of actual misuse in a given case. United

(Continued on following page)

the doctrine's "prophylactic purpose" precludes the imposition of any limit on overbreadth standing. Resp. Br. at 44. He is mistaken. By establishing the overbreadth doctrine, this Court has relaxed the standards for standing, but it has not abandoned them.[8] It is still necessary to satisfy the Article III requirement for an actual case or controversy, as well as prudential concerns.

1. Hicks argues that the requirement that overbreadth be "substantial" serves as a significant limitation on the doctrine and that no further limitation is necessary. *See Id.* But the "substantial" requirement is a *substantive* limitation, not a *standing* limitation. It affects whether a party will be successful in his overbreadth challenge, not whether he can bring the challenge in the first place. If substantive rules of judicial decision-making are allowed to displace rules of standing, then courts will become the sort of "roving commissions" that this Court has found unacceptable. *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973).

2. Hicks complains that imposing limitations on overbreadth standing would require courts to decide the "complicated factual question" of whether the party's conduct was expressive, an issue unrelated to whether the

States Br. at 17-21. The Commonwealth adopts this argument as an alternative to its proposed bright-line rule.

[8] This Court has sometimes spoken in terms which, if considered in isolation, may seem broad enough to permit overbreadth challenges without regard to whether the litigant was engaged in expressive activity. *See* Resp. Br. at 42-44. However, this question has not been previously presented and use of such broad language has not resolved it. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) ("It is of course contrary to all traditions of our jurisprudence to consider the law on this point conclusively resolved by broad language in cases where the issue was not presented or even envisioned."); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 65 (1976) ("Broad statements of principle, no matter how correct in the context in which they are made, are sometimes qualified by contrary decisions before the absolute limit of the stated principle is reached.").

challenged law is overbroad. *See* Resp. Br. at 45. Exactly so. The issue of standing is separate and distinct from the substantive issue. It must be treated separately. Moreover, deciding factual questions about a party's conduct is not so daunting; courts do it all the time.

3. Hicks contends that, by delivering diapers, he was engaged in expressive conduct, quoting the proposition that one can conceive of "some kernel of expression in almost every activity a person undertakes. . . . " *Id.* (quoting *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989)). But he ignores the rest of the statement: "such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *Dallas*, 490 U.S. at 25.

4. Hicks attributes to the Commonwealth the view that he would have standing in this case if only he had carried a sign or worn a T-shirt with a message objecting to the trespass policy. Resp. Br. at 45. He is mistaken. Expressive activity is *necessary* to invoke the overbreadth doctrine, but it is not *sufficient*. It is also necessary for the criminal defendant to be challenging that portion of the statute, regulation or policy he is charged with violating. *See* Com. Br. at 18. Hicks was prosecuted because he violated the Trespass-After-Warning rule. He cannot evade that barment by coming back to dispute some other portion of the policy.

5. Hicks claims the Commonwealth's approach would limit overbreadth challenges to the "odd category of cases" where the person was engaged in "expressive conduct that is not protected by the First Amendment." Resp. Br. at 44. But there is nothing "odd" about such cases. They are precisely the cases for which the overbreadth doctrine was developed. "[O]verbreadth analysis reflects the conclusion that the possible harm to society from allowing *unprotected speech* to go unpunished is outweighed by the possibility that protected speech will be muted." *Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977) (emphasis added). Where litigants are engaged in protected expression, they have standing under the traditional rule and overbreadth standing is not necessary.

6. Finally, Hicks argues that there is no constitutional distinction between "expressive conduct that is *not* protected by the First Amendment" and "conduct that is simply not expressive." Resp. Br. at 44 (emphasis in original) (citing *Chaplinski v. New Hampshire*, 315 U.S. 568, 572 (1942)). Yet, *Chaplinski* does not deal with overbreadth standing, and not even by analogy does it support the proposition urged by Hicks. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 383-85 (1992) (explaining *Chaplinski*).

B. The Issue of Overbreadth Standing Is Properly Before This Court.

Hicks tries to short circuit the standing issue by recycling two arguments he advanced unsuccessfully in opposing certiorari. He claims that (i) the Commonwealth "waived" its right to question his standing, and (ii) this Court has no power to review "prudential limitations on standing established by the Virginia Supreme Court." Resp. Br. at 38. The Commonwealth refuted these arguments in its reply brief at the certiorari stage. *See* Reply Brief of Petitioner ("Cert. Reply Br.") at 2, 6-8. These arguments had no merit when Hicks first raised them, and they have no merit now.

Additionally, Hicks' argument that this Court is precluded from reviewing the issue of standing misunderstands this Court's standards. The standard is not whether the Commonwealth argued the issue below, but whether the issue was "pressed or passed upon" by the lower court. *United States v. Williams*, 504 U.S. 36, 41 (1992). "[T]his rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon . . . ." *Id.* Clearly, the lower court passed upon the issue of whether Hicks had standing to bring an overbreadth challenge. As the dissent notes:

> The majority reaches this issue [of overbreadth] by allowing the defendant to make a facial challenge to the Authority's trespass policy. I do not believe that such a challenge is permissible in this case.

* * *

> *Explaining the defendant's standing*, the majority states that, "in the context of a First Amendment challenge, a litigant may challenge government action . . . even if that government action as applied to the litigant is constitutionally permissible." The majority intertwines its *examination of the standing issue* and its substantive analysis of the trespass policy . . . .

J.A. at 167-68 (Kinser, J., joined by Lemons, J., dissenting) (emphasis added; quoting J.A. 159). *See* J.A. 159-60 (majority opinion) (contrasting "traditional rule" of standing with overbreadth exception).

Finally, contrary to Hicks' suggestion, the lower court's decision that Hicks has standing does not reflect the application of a state rule of prudential standing. Rather, the lower court believed that this Court's pronouncements of federal constitutional law *required* it to hold that Hicks has standing. *See* J.A. 159 (discussing what litigant may challenge based on what "[t]he Supreme Court has held . . ." and citing U.S. Supreme Court). Certainly, this Court may review a lower court's application of this Court's precedents.

III. THE HOUSING AUTHORITY ACTS AS LANDLORD – NOT AS SOVEREIGN – AND ITS TRESPASS POLICY IS REASONABLE.

Hicks says the streets at issue were once "similar" to "all other streets in Richmond." Resp. Br. at 1. But that is history. When the City closed those streets and deeded them to the Housing Authority, their legal status changed. *See* J.A. 75 and 81. They became the property of the Housing Authority, just as if the Housing Authority had owned them from the beginning.

A. The Streets and Sidewalks of Whitcomb Court Are a Non-public Forum.

The United States suggests three factors to be considered in determining whether property that was once a

traditional public forum has been converted to another use.[9] Hicks embraces these factors, but then fails to apply them correctly. *See* Resp. Br. at 30-32.[10]

1. Hicks asserts that the Whitcomb Court streets are not "as a practical matter, closed to the public." Resp. Br. at 30. Certainly, there are no physical barriers preventing entry onto the streets. However, for law-abiding citizens, physical obstructions are unnecessary. "No Trespassing" signs are enough – and the signs are plentiful. J.A. 55-56, 154-55. Hicks then says that anyone may enter the streets so long as he has a "legitimate purpose." Resp. Br. at 30. That is exactly the point. The requirement that visitors have a legitimate purpose sharply distinguishes Whitcomb Court from ordinary streets, where the general public may wander at will, with or *without* any particular purpose. Moreover, by listing some of the visitors who may have a legitimate purpose, Hicks merely underscores the reasonableness of the requirement. *See* Resp. Br. at 30-31. Finally, the streets are not thoroughfares. As a practical matter, no one need enter them other than residents of Whitcomb Court and others having a legitimate social or business purpose.

2. Hicks says that government has not "taken sufficient steps to make its closure of streets clear to the public." Resp. Br. at 31. Again, he is mistaken. The street closing was accomplished in a public meeting through the enactment of a public law by the Richmond City Council – a body chosen by Richmond voters to act in the public interest. Moreover, the signs posted every 100 feet carry the unambiguous warning

[9] The three factors are: "(1) whether the sidewalk and street in question are, as a practical matter, closed to the public; (2) whether the government has taken sufficient steps to make that closure clear to the public; and (3) whether the purpose served by the sidewalks and streets at issue is consistent with a finding that they have become a nonpublic forum." United States Br. at 29.

[10] Hicks fails to address the two-part analysis based on "location" and "purpose" found in *United States v. Kokinda*, 497 U.S. 720, 729-30 (1990) (plurality). *See* Com. Br. at 40-41.

that the streets are private. *See* Com. Br. at 5-6. The public has ample notice that the streets are closed.

3. Hicks suggests that the purpose of the streets "remains what it has always been" and thus is inconsistent with a finding that they are now a non-public forum. Resp. Br. at 31. But this simply is not so. Use of the streets and sidewalks is now limited to persons having a legitimate purpose for being there. Hicks says the streets "serve as a pathway to homes, school, polling place, and other facilities located on those streets, as well as a space for community life." *Id.* But the "homes" to which Hicks refers are simply the apartment units forming the housing project. The "school" is accessible to the public by another street, *see* J.A. 79, and there is no evidence that anyone – other than residents of Whitcomb Court – approaches the school through privatized streets belonging to the housing project. There is no polling place except on election days.[11] Moreover, Hicks has not identified any "other facilities" except for the "Whitcomb Court Recreation Center" – again part of Whitcomb Court – where a group of children may meet. Such uses are far more limited than the broad purposes served by traditional city streets and sidewalks. Finally, describing the streets as "a space for community life" begs the question. Assuming that crime is brought under control, they may become spaces for "community life" among residents of Whitcomb Court, but not for the public at large. Thus, under the three-part test suggested by the United States, the streets and sidewalks of Whitcomb Court are a non-public forum.

B. Hicks Misreads *Marsh* and *Rucker*.

1. Hicks makes the sweeping claim that "private owners . . ., like the government, cannot restrict access to

[11] There is no right-to-vote problem here. As a matter of state and/or federal law, a voter may surely enter private property to vote at his assigned polling place even if such entry would otherwise be an unlawful trespass due to barment by the property owner. The Commonwealth does not contend otherwise.

spaces, such as streets and sidewalks, that are used by the general public." Resp. Br. at 30. In support of this assertion, he cites *Marsh v. Alabama*, 326 U.S. 501 (1946). However, *Marsh* is easily distinguishable and uses a mode of analysis that actually supports the Housing Authority.

a. In *Marsh*, the site in question was not an apartment complex. It was an entire town – Chickasaw, Alabama. The town had "all the characteristics of any other American town," but was owned by a private corporation. *Id.* at 502. The Court ruled that a person could not be constitutionally convicted of trespass for distributing religious literature on a sidewalk in the town business block. As the Court explained:

> Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free.

Id. at 507.

This case is the other side of the *Marsh* coin. Whether a private corporation or a government entity owns an apartment complex, the owner has an identical interest in operating the complex in a manner that promotes the security of the premises and its residents. In other words, just as towns generally are not owned by private corporations, apartment complexes generally are not owned by governments. *Marsh* stands for the proposition that, where a town is owned by a private corporation, its streets will be subject to the same rules of access as ordinary towns. The converse should also be true. Where an apartment complex is owned by government, its streets should be subject to rules of access similar to those at ordinary,

privately owned apartments. Government as landlord may impose restrictions that government as sovereign cannot.[12]

b. In *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), the Court rejected an argument similar to the one made by Hicks. Discussing privately owned streets and sidewalks, this Court held that property does not "lose its private character merely because the public is generally invited to use it for designated purposes." *Id.* at 569. The Court also explained its decision in *Marsh*, noting that "the owner of the company town was performing the full spectrum of municipal powers." *Id.* Such powers greatly exceed the Housing Authority's limited role. *See* Va. Code § 36-19.

2. In *Department of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 135 (2002), this Court recognized a distinction between government as "sovereign" regulating "members of the general populace" and government as "landlord of property it owns" dealing with tenants and regulating that property. Hicks argues that, because he was not a tenant, the Housing Authority can only affect him as a member of the "general populace," and that the Housing Authority is acting as sovereign when it applies its trespass policy to him. Resp. Br. at 28-29. He is mistaken. When a person steps across a property line onto the land of another, he is no longer a member of the "general populace." He then becomes an invitee or licensee or trespasser, depending on the property owner's permission or prohibition. The power of the Housing Authority – like the power of any property owner – is bounded by that same property line. In deciding whether to allow entry onto its premises, the Housing Authority is acting like any other property owner. It is acting as landlord, not as sovereign.

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[12] *See* Com. Br. at 37-38. (Noting that government as landlord is still subject to some restrictions not applicable to private owners).

C. The Housing Authority Trespass Policy Is a Reasonable Response to the Epidemic of Crime at Whitcomb Court.

"Open-air drug markets have returned to Whitcomb Court" in the wake of the decision below. *See* Housing Authority Br. at 15. Hicks does not deny this. Even so, he contends that the Housing Authority trespass policy is unreasonable, claiming there is no rational relationship between the policy and the four goals of street privatization listed in the Housing Authority brochure.[13] Resp. Br. at 33-37. He is mistaken.

1. Under the trespass policy, it is not necessary to wait until someone is caught in the act of dealing drugs or until shots are fired or someone is assaulted. By requiring visitors to have a legitimate purpose in order to enter the premises, those with illegitimate purposes can be turned away at the threshold. By giving this besieged community a forward line of defense, the trespass policy promotes the first two goals: "removing persons who commit unlawful acts" and "ensur[ing] that children have places to play free of . . . criminal activity." J.A. at 87.

2. When residents of public housing live under a "reign of terror," 42 U.S.C. § 11901(3) (Congressional finding), it is exceedingly difficult for the community to summon the resolve and other resources necessary to organize effectively. By substantially thinning out the criminal element on the premises, the trespass policy gives the community the breathing space it needs, thereby promoting the third goal: "provid[ing] an opportunity for

[13] Hicks also suggests that the goals listed in the brochure (J.A. 87) may not reflect the true purpose of the City of Richmond in closing the streets or the true purpose of the Housing Authority in adopting its trespass policy. Resp. Br. at 35, n.6. Such a suggestion ignores both the record and the *amicus* brief jointly filed by the Housing Authority and the City of Richmond.

residents to develop safety initiatives . . . such as resident patrols . . . and neighborhood watch." J.A. at 87.

3. The fourth goal – holding accountable households that "knowingly harbor" criminals – is also promoted. Without the trespass policy, those who come on the premises need not identify what household, if any, they are visiting. With the trespass policy in place, any links between outside visitors and households can be more easily discerned. If a visitor turns out to be engaged in criminal activity, this information allows the Housing Authority to hold residents responsible for the conduct of their guests. *See Rucker*, 535 U.S. at 130.

4. Hicks' claim that the trespass policy is unreasonable is also refuted by the widespread use of such policies at public housing projects nationwide. *See* Large Public Housing Authorities Br. at 7 n.3 and 8 n.6 (noting that almost 85% of public housing authorities have adopted trespass-barment policies and view them as "essential to controlling crime and drugs in [their] developments").

D. The Trespass Policy Protects Resident Safety and the First Amendment.

Hicks and some *amici* contend that the streets of Whitcomb Court must be treated as a traditional public forum in order to protect freedom of speech. They are mistaken. The challenge here is to fashion a legal tool that distinguishes between (i) the right to engage in legitimate communications with residents, and (ii) the "right to wander" that has allowed criminals from the outside to disrupt and endanger the lives of those same residents. The former right must be protected, and the abuse of the latter curtailed. However, in a traditional public forum, the right to engage in speech and the right to wander apparently go hand-in-hand. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). Under that model, the Housing Authority cannot exclude *either* sort of visitor from the streets. Even if such an approach protected free speech, it would do so by sacrificing the safety of families who reside in public housing. Furthermore, such an approach would

not guarantee access to those wanting to engage in door-to-door leafleting. They would still have to enter the curtilage of the apartment buildings, an area that is plainly a non-public forum. Thus, treating the streets as a traditional public forum would sacrifice tenant safety without benefitting freedom of expression.

On the other hand, treating these streets as a non-public forum means there is no unlimited "right to wander." The Housing Authority may require visitors to have a legitimate purpose for entering the property, thereby providing residents a significant measure of protection against the criminals who have plagued public housing. Even so, freedom of expression can be protected because one legitimate purpose for coming to a housing project – streets and curtilege – may be to engage in legitimate communications with those residents. To be sure, such communications may be regulated more closely in a non-public forum than in a traditional public forum. *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 677-78 (1992). However, viewpoint discrimination is still prohibited, and any regulations that might be imposed must pass scrutiny under a reasonableness standard. What a reasonableness standard entails may vary in detail, depending on the facts of a particular situation, thereby leaving courts with broad discretion to curtail any restrictions that seem excessive. The safety of residents and freedom of expression can both be protected.

IV. HICKS' VOID-FOR-VAGUENESS CLAIM HAS NO MERIT AND HICKS HAS NO STANDING TO RAISE IT.

Hicks claims the Housing Authority trespass policy is invalid, arguing that a key term – "legitimate" – is unconstitutionally vague and that the policy is analogous to the ordinance struck down in *City of Chicago v. Morales*, 527 U.S. 41 (1999). Resp. Br. at 22. His claim has no merit, and he lacks standing to raise it.

A. This is a new argument. Though vagueness concerns were raised at various times below, nowhere before

now has Hicks argued that "legitimate" is insufficiently precise to satisfy due process. The state supreme court did not address the argument, nor did Hicks mention it in opposing certiorari. While he suggested several issues he would raise if certiorari were granted, vagueness was not among them. *See* Hicks' Brief in Opposition at 15. For these reasons alone it would be improvident for this Court to take up the question. Hicks' last minute effort to inspire ill-founded void-for-vagueness concerns ought not distract this Court's attention from the real and important questions upon which certiorari was granted.

B. Even if Hicks had previously criticized the word "legitimate," he would not have standing. In *Morales*, the defendants challenged the ordinance they were charged with violating. Hicks is challenging a *different* rule than the one he violated. Insofar as vagueness may allegedly affect freedom of speech, Hicks lacks standing under the overbreadth doctrine. *See* Com. Br. at 21; *supra* at 5-8. Insofar as vagueness may allegedly affect the "right to wander" or "right to visit," there is no corollary to the overbreadth doctrine.[14] Traditional standing rules apply. *See Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982). Hicks may not bring a vagueness challenge to vindicate the rights of others. *Parker v. Levy*, 417 U.S. 733, 756 (1974).

C. Hicks cannot claim vagueness in his own case. The trespass policy clearly applied to his conduct. He was prosecuted because he violated the Trespass-After-Warning rule. This rule clearly states that anyone barred from Housing Authority property, who returns without permission, will be subject to arrest and prosecution for criminal trespass. J.A. 84-85. The same warning is found

[14] Allowing Hicks to use the streets and sidewalks of Whitcomb Court would still leave him barred from the buildings, curtilage and common areas. Thus, Hicks' "right to visit" cannot be vindicated in this case and need not be considered by the Court.

in the written barment notice given to Hicks. J.A. 90-91. He knew full well that he would be prosecuted if he returned to Whitcomb Court.

D. Even if Hicks had standing, his challenge would lack merit. It is not at all clear that the void-for-vagueness doctrine reaches property access policies which, like the Legitimate Purpose rule, do not lead directly to imposition of penalties. Hicks has cited no cases from this Court showing that it applies, and the Commonwealth is unaware of any such decisions. And, even if the doctrine can be applied to the trespass policy, "[t]he degree of vagueness that the Constitution tolerates depends in part on the nature of the enactment." *Hoffman Estates,* 455 U.S. at 498. Hicks believes the trespass policy should be treated like the ordinance struck down in *Morales*, however, the policy is fundamentally different from that ordinance in at least five ways.

1. *Governmental roles:* In *Morales*, the ordinance was a criminal law enacted by Chicago acting in its capacity as *sovereign*. It regulated the general populace throughout the city. In contrast, the trespass policy is an administrative rule adopted by the Housing Authority in its proprietary capacity as *landlord*. It affects only non-residents who enter Housing Authority property.

2. *Nature of the property:* The public sidewalks governed by the Chicago ordinance were a traditional public forum. The sidewalks affected by this trespass policy are a non-public forum, where government has wider discretion. *See* Com. Br. at 40; *supra* at 9-11. *See also* Crim. Jus. Legal Foundation. Br. at 13.

3. *Alternative venues:* The Chicago ordinance applied throughout the city to any location open to the public, whether owned publicly or privately. *Morales*, 527 U.S. at 47. The trespass policy applies only within the narrow confines of Housing Authority property. Countless other venues remain available – nearby and throughout Pichmond – for citizens to associate with each other or engage in expressive activity.

4. *Consequences of violation*: The Chicago ordinance was a criminal law, and violating it resulted in a fine or jail

time or both. The trespass policy is not a criminal law. It merely explains when the Housing Authority will press charges for trespass under Virginia Code § 18.2-119. If someone has been barred wrongly he may challenge the basis for his barment. Hicks never made such a challenge. Given his two guilty pleas for trespassing and his conviction for damaging property, his failure to do so is understandable.

5. *Language employed:* Most importantly, the *Morales* ordinance used a highly subjective standard – "with no *apparent* purpose" – which made the lawfulness of a citizen's conduct depend not on facts as they actually existed, but on a policeman's *perception* of those facts.[15] The trespass policy has no such Achilles' heel. Concerns whether a person has a legitimate purpose usually can be quickly resolved simply by asking the resident whom the person says he has come to visit. In *Morales*, there was no such ready source of guidance to police. Moreover, the term "legitimate" is found frequently in the law.[16] While there might be disagreement at the margins about what is covered, the standard focuses on the facts as they are, not on how they may be perceived by whatever policeman happens to be there at the time. As this Court has explained:

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[15] A similar flaw led the Court to strike down laws in *Kolender v. Lawson*, 461 U.S. 352, 359 (1983) ("suspect violates [the statute] unless the officer is satisfied that the identification is reasonable"); and in *Coates v. City of Cincinnati*, 402 U.S. 611, 613 (1971) (statute bans "annoying" conduct, even though conduct annoying some does not annoy others). In all three cases, statutes imposed criminal penalties because a person failed to comply with a standard residing nowhere but the mind of another. There is no such problem here.

[16] *See, e.g.,* 7 U.S.C. § 8401(b)(4) (providing for availability of biological agents and toxins for research, education, and other *legitimate purpose*); 8 U.S.C. § 1367(b)(2) (providing that information about alien may be disclosed solely for a *legitimate* law enforcement *purpose*); 18 U.S.C. § 1514(c)(1)(B) (defining "harassment" as conduct directed at a specific person that serves no *legitimate purpose*); 25 C.F.R. § 11.441(a)(3) (defining "disorderly conduct" as creating hazardous or physically offensive condition by act serving *no legitimate purpose* of actor).

> [A]lthough [the] prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.

United States Civil Serv. Comm'n v. Letter Carriers, 413 U.S. 548, 578-79 (1973). Anyone entering Housing Authority property will know whether his purpose is legitimate. If it is legitimate, he has no reason to expect that he will be barred.[17] There is no vagueness here. The policy is constitutional.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the brief of petitioner, the judgment of the Supreme Court of Virginia should be reversed.

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April 22, 2003

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[17] Sometimes attacking the word "legitimate" and sometimes ignoring it, Hicks erroneously suggests that the policy "grant[s] . . . unchecked authority to Housing Authority officials to decide who may or may not use streets and sidewalks." Resp. Br. at 34. The policy contains no such sweeping terms. Even the unwritten addendum, applied by Ms. Rogers to leafleting, represents an attempt to ensure that those purporting to engage in that activity are legitimate.

No. 02-371

In the Supreme Court of the United States

COMMONWEALTH OF VIRGINIA, PETITIONER

v.

KEVIN LAMONT HICKS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether a defendant whose non-expressive conduct violates a regulation limiting access to government property may bring a facial overbreadth challenge to that regulation on the ground that its application to expressive conduct would violate the First Amendment.

2. Whether the degree of discretion that officials may exercise to permit individuals to enter government property in order to engage in expressive conduct varies depending on whether that property is a public forum.

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COMMONWEALTH OF VIRGINIA, PETITIONER

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The United States has ownership and other interests in a wide variety of types of property and therefore has an interest in the substantive and procedural standards that govern challenges to the regulation of public activities, including expressive activities, on such property. See, *e.g.*, *United States* v. *Kokinda*, 497 U.S. 720 (1990) (post office sidewalk); *United States* v. *Grace*, 461 U.S. 171 (1983) (Supreme Court grounds); *United States Postal Serv.* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981) (postal letterbox); *Greer* v. *Spock*, 424 U.S. 828 (1976) (military base). In addition, the United States assists public housing agencies in financing the development, acquisition, and operation of low-income housing projects. 42 U.S.C. 1437 *et seq.* Accordingly, the United States has a substantial interest in the ability of local housing agencies to take steps to ensure tenants' safe use and enjoyment of the housing premises, as well as the ability of the tenants to have reasonable accommodation made for their guests. See 24 C.F.R. 966.4(d)(l); see also

Department of Hous. & Urban Dev. v. *Rucker*, 535 U.S. 125 (2002).

STATEMENT

1. This case involves Whitcomb Court, a troubled public housing development in Richmond, Virginia. The development had been described as an "open-air drug market," and "[t]he majority of persons who had been arrested for drug crimes at the Whitcomb Court housing development were individuals who did not reside there." Pet. App. 3. In an effort to address those problems, the Richmond Redevelopment and Housing Authority, a political subdivision of the Commonwealth of Virginia and the owner and operator of Whitcomb Court, sought to limit access to the property. In 1997, the City of Richmond, which owned the streets located within Whitcomb Court, passed an ordinance declaring that the streets in the development were "closed to public use and travel" and conveyed title to the streets to the Housing Authority. *Ibid.* The deed conveying title required the Housing Authority to "make provisions to give the appearance that the closed streets, particularly at the entrances, are no longer public streets[.]" *Ibid.*

The Housing Authority accordingly placed signs on the housing development's buildings and every 100 feet along the streets, stating, *inter alia*, "NO TRESPASSING," "YOU ARE NOW ENTERING PRIVATE PROPERTY AND STREETS OWNED BY RRHA," and "UNAUTHORIZED PERSONS WILL BE SUBJECT TO ARREST AND PROSECUTION." Pet. App. 4. At the same time, the Housing Authority authorized the Richmond Police to serve notice on any unauthorized person on Housing Authority property forbidding that person to return to such property if "such person is not a resident, employee, or such person cannot demonstrate a legitimate business or social purpose for being on the premises." *Id.* at 98. In addition, the Housing Authority gave the police the authority to arrest any person who, "having been duly notified, either stays upon or returns to" Housing Authority property. *Id.* at 98-99.[1]

According to the Supreme Court of Virginia, under the Housing Authority's policy, "individuals who sought access to the Housing Authority's property, including the streets, needed to obtain * * * permission for such access" from Gloria Rogers, the manager of Whitcomb Court. Pet. App. 5. She "was required to determine whether a person can demonstrate a legitimate business or social purpose to use the Housing Authority's property * * * including the streets." *Ibid.* In particular, a person who wanted "to disseminate materials or participate in an activity on the property" had to obtain permission from Rogers. *Ibid.* If a person requested access to the property from Rogers, she sometimes "referred such request to a 'community council' which met with 'the [Whitcomb Court] Board and the residents." *Ibid.* In addition, "if an individual submitted a request to distribute flyers and the request was not 'routine,' she referred that request to the Housing Authority's director of housing operations for resolution." *Ibid.* Aside from the general "legitimate business or social purpose" guideline,

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[1] Under Virginia's notice-trespass statute, Va. Code Ann. § 18.2-119 (Michie 2002), a person who enters the property of another after having received notice not to do so is guilty of the misdemeanor of trespassing. The statute provides:

> If any person without authority of law goes upon or remains upon the lands, buildings or premises of another, * * * after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian or other person lawfully in charge thereof, or after having been forbidden to do so by a sign or signs posted by such persons * * * at a place or places where it or they may be reasonably seen * * * he shall be guilty of a Class 1 misdemeanor.

See Model Penal Code § 221.2, cmt. 1 (1980) ("The common thread running through [criminal trespass statutes] is the element of unwanted intrusion, usually coupled with some sort of notice to would-be intruders that they may not enter.").

there were no written policies or procedures governing "decisions regarding who may distribute materials or participate in activities on the Housing Authority's property." *Ibid.*

2. On January 20, 1999, respondent was arrested for trespassing on the sidewalk on Bethel Street, a street that is entirely encompassed within Whitcomb Court and passes through the middle of the property. Pet. App. 6, 32, 97. Respondent's mother, his baby, and the baby's mother live at Whitcomb Court. *Id.* at 32. When he was arrested, respondent stated that he was delivering diapers to his baby. *Ibid.* Respondent had earlier been convicted of trespassing on Whitcomb Court property on February 10, 1998, and June 26, 1998, and he had been convicted of damaging property on Whitcomb Court on April 27, 1998. *Id.* at 6, 32. On April 14, 1998, before his second conviction for trespassing and his conviction for damaging property, Rogers delivered him a letter informing him that "effective immediately you are not welcome" on Housing Authority property, that "you are not to trespass on [Housing Authority] property," and that "[i]f you are seen or caught on the premises, you will be subject to arrest by the police." *Id.* at 107.

Respondent was charged with violating Virginia's notice-trespassing misdemeanor statute. See note 1, *supra*. He was tried and convicted on that charge in the City of Richmond General District Court. Pet. App. 2. He appealed his conviction to the Circuit Court of the City of Richmond, where he was again convicted after a bench trial. *Id.* at 82-85.

3. After a panel of the intermediate state appellate court ruled that his conviction should be affirmed, Pet. App. 59-81, the en banc court reversed by a 6-5 vote, *id.* at 28-58.

The majority stated that "[t]he critical issue is whether the 'privatized' streets and sidewalks are public and as such are a 'traditional public forum,' or whether they are 'private' and, thereby, a 'nonpublic forum.'" Pet. App. 34. The court

held that the city "is not permitted to transform the public streets and sidewalks in Whitcomb Court into private, nonpublic property simply by passing an ordinance declaring them closed, conveying them to another governmental entity, [the Housing Authority], and placing signs along the streets." *Id.* at 38. Having concluded that the streets in Whitcomb Court remained a public forum, the court held that the restrictions on access were not narrowly tailored to serve the interest in crime control. *Id.* at 41.

The five dissenting judges would have barred respondent from raising this "untimely and improper collateral attack on his barment status," because he had not taken advantage of judicial opportunities at the time of his prior trespassing convictions and administrative opportunities since that time to challenge his barment. Pet. App. 45. They also would have held that respondent's First Amendment overbreadth challenge cannot succeed, because the constitutional reach of the trespass policy "dwarfs its arguably impermissible applications." *Id.* at 49. The dissent also argued that the street on which respondent was arrested was no longer a traditional public forum, because it had been deeded to the Housing Authority, the Housing Authority had posted no-trespassing signs, and the property had been treated as private for at least a year before respondent's arrest. *Id.* at 52. In the dissent's view, "there is absolutely no evidence that the streets and/or sidewalks of the Whitcomb Court property remained open to a public flow of traffic." *Ibid.* The dissent concluded that "any potential interference with an individual's right of expression * * * is reasonable, limited and justified to achieve the legitimate purpose of protecting [Whitcomb Court] residents from crime." *Id.* at 54.

4. a. The Supreme Court of Virginia affirmed. The court framed "[t]he narrow issue * * * in this appeal" as "whether a redevelopment and housing authority's trespass policy is overly broad and thereby violates the First and

Fourteenth Amendments." Pet. App. 2. The court stated that "in the context of a First Amendment challenge, a litigant may challenge government action granting government officials standardless discretion even if that government action as applied to the litigant is constitutionally permissible." *Id.* at 9.

In this case, the Court held that "[e]ven though the Housing Authority's trespass policy * * * is designed to punish activities that are not protected by the First Amendment, the policy also prohibits speech and conduct that are clearly protected by the First Amendment." Pet. App. 13. In particular, the court observed that Rogers, the manager of the property, "has unfettered discretion to determine who can distribute literature" at the project and that "a non-resident of Whitcomb Court can only distribute such literature if that non-resident obtains authorization from Rogers." *Id.* at 14-15. The court stated that "Rogers has the unfettered discretion to determine not only who has a right to speak on the Housing Authority's property, but she may prohibit speech that she finds personally distasteful or offensive even though such speech may be protected by the First Amendment." *Id.* at 16. On that basis, the court concluded "that the Housing Authority's trespass policy is overly broad and that [respondent] may assert this issue in this criminal prosecution." *Id.* at 17.

The court recognized that "the Court of Appeals decided this case on the basis that the Housing Authority's private streets constitute a public forum and that the Housing Authority's efforts to regulate speech in that forum contravene the First Amendment." Pet. App. 16. But, the court stated, in light of what it characterized as its "limited holding," it "need not resolve this issue" but would instead "reserve consideration of this issue for another day." *Ibid.*

b. Justice Kinser, joined by one other member of the court, dissented. In his view, the court erred in holding that

respondent could bring this facial challenge. He pointed out that this Court's cases cited by the Virginia Supreme Court in support of its conclusion that respondent's facial challenge is permissible each "addressed a statute requiring a license or permit to engage in First Amendment activity." Pet. App. 18. But "[b]ecause the Authority's trespass policy does not directly regulate activity protected by the First Amendment, but instead limits access to government property, * * * these cases are not persuasive authority to justify the defendant's facial challenge to the trespass policy." *Id.* at 19. Because the Housing Authority's trespass policy at issue in this case "is directed at conduct, namely trespassing, and not pure speech," *id.* at 21, the dissent explained that it must be shown to be "substantially overbroad" before it can be attacked through a facial challenge, *id.* at 22. The dissent concluded that, because the policy's legitimate sweep in regulating trespassing on government property is much greater than any impermissible applications, respondent could not make such a showing. *Ibid.*

The dissent also concluded that "if a facial challenge is to be allowed in this case, it should be analyzed under the framework established by the Supreme Court for deciding when an individual's First Amendment rights have been violated by a denial of access to government property." Pet. App. 23. In particular, "the nature of the forum must * * * be identified, 'because the extent to which the Government may limit access depends on whether the forum is public or nonpublic.'" *Ibid.* (quoting *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985)).

SUMMARY OF ARGUMENT

I. Respondent was not engaged in expressive activity when he violated the Housing Authority's trespass policy. Accordingly, respondent's First Amendment challenge to that policy may proceed only as an overbreadth challenge—*i.e.*, only on the ground that the policy is unenforceable

against him because it would be unconstitutional as applied to others who *are* engaged in expressive activity. Allowing such third-party challenges imposes serious costs. It restricts society's ability to enforce its laws against persons whose conduct is constitutionally unprotected. It also requires courts to decide constitutional issues in an entirely abstract context. And it may lead to the premature and unnecessary resolution of serious constitutional questions. Although the overbreadth doctrine permits First Amendment challenges to be brought to substantially overbroad statutes in limited circumstances to avoid a chill to the expressive rights of parties not before the court, the doctrine's application is limited. It should not be extended to the circumstances of this case, for two related reasons.

First, all of this Court's overbreadth cases have involved parties who themselves had engaged—or sought to engage—in expressive activity. The doctrine ought not be extended farther, to parties like respondent, who have not engaged in expressive activity subject to the regulation under attack. The costs of a challenge like respondent's are more substantial than in an ordinary overbreadth case; a challenge like respondent's, if successful, will disable society from enforcing its laws even against those engaged in no expressive activity at all. It also may easily result in courts prematurely and perhaps unnecessarily deciding constitutional questions. In this case, for example, there is no reason to believe that the challenged trespass policy has any impact at all on expressive activity or that anyone seeking to engage in such activity on Whitcomb Court property has ever been denied permission to do so. Accordingly, an overbreadth challenge to a regulation by a party who has not himself engaged in expressive activity subject to the regulation should not be entertained.

Second, this Court has permitted overbreadth challenges to statutes that regulate speech or conduct closely related to

speech, but it has noted that the doctrine's rationales would not permit overbreadth challenges to laws of more general applicability that are in no way directed toward speech or to conduct closely related to speech. Such laws pose a lesser danger to First Amendment rights, and they thus do not call for the "strong medicine" of overbreadth challenges. Because the Housing Authority's trespass policy sweeps far beyond speech or speech-related conduct and was adopted for reasons having nothing to do with suppression of speech, it should not be analyzed for overbreadth. It would be particularly unwarranted to invalidate the trespass policy on overbreadth grounds to the extent that the policy regulates entirely nonexpressive conduct. For similar reasons, the policy would not in any event be *substantially* overbroad, even if an overbreadth challenge could otherwise be maintained in this case.

II. If the Court holds that respondent's overbreadth challenge may be entertained, the decision of the Virginia Supreme Court should nonetheless be reversed. That court held that the Housing Authority's trespass policy violates the First Amendment because it vests too much discretion in the manager of Whitcomb Court to determine whether those engaged in expressive activity will be permitted on the property. The court, however, erred in reaching that conclusion without determining whether the Whitcomb Court sidewalks, which once were ordinary city sidewalks, retain their character as a public forum.

If the property at issue remains a public forum, then the vesting of discretion in the manager presents serious First Amendment problems. But if the sidewalks of Whitcomb Court are not a public forum, then the government has substantially broader ability to regulate expression on it. Insofar as Whitcomb Court has become an area not generally open to the public, the government may vest discretion in a gatekeeper to permit entry only to those with legitimate

purposes for being there, just as it may do the same at a government-owned military base or office building. Nor does the fact that the streets of Whitcomb Court was at one time a public forum demand the conclusion that it retains that status; property that once was a public forum may surely be converted to another use.

United States v. *Grace*, 461 U.S. 171 (1983), establishes that merely enacting a law declaring speech off-limits in what was a public forum is insufficient to convert a public forum to another use. But this Court has not addressed what more is required before a government-owned property that was a traditional public forum has been converted to another use, such that the rules restricting government regulation in a public forum are no longer applicable. The Court ought not address that question in the first instance, without the benefit of a decision on the issue by the court below and on the thin record in this case. If the Court holds that respondent may bring a First Amendment overbreadth challenge in this case, therefore, the Court should reverse the decision of the Virginia Supreme Court and remand for further proceedings, so that the question whether the street on which respondent was arrested was a public forum may be addressed in the first instance by the courts below and with whatever further factual development is necessary.

ARGUMENT

I. RESPONDENT'S FACIAL CHALLENGE TO THE HOUSING AUTHORITY'S TRESPASS POLICY SHOULD NOT HAVE BEEN ENTERTAINED

At the time he was arrested, respondent was walking on a sidewalk located on Housing Authority premises. He stated that he was delivering diapers to his baby, who lived at the development. Pet. App. 32. He did not claim—and he has never claimed—that he was on the premises for any expressive purpose that would trigger First Amendment protection. He did not claim that he was handing out leaflets, that

he was organizing a demonstration, or that he was in any way trying to get a message across to the public.[2] Accordingly, respondent's conduct was not protected by the First Amendment's guarantee of freedom of expression, and the Housing Authority's trespass policy as applied to him—*i.e.*, its determination that it did not want to permit him to trespass on its property—did not intrude on any of his own First Amendment rights. Respondent's First Amendment challenge to the trespass policy may thus proceed, if at all, only as an overbreadth challenge—*i.e.*, only on the ground that the claimed unconstitutionality of the policy as it might be applied to others, who *are* engaged in First Amendment protected activity, is sufficient to make the policy unenforceable against him.

Such an overbreadth challenge does not lie in this case, for two related reasons. First, this Court has never held that a First Amendment overbreadth challenge may be brought by a party not engaging in expressive activity subject to the challenged regulation, and it ought not extend the doctrine now to permit such challenges. Second, this Court has cautioned against permitting First Amendment facial challenges to laws of general applicability that extend to conduct with little connection to speech. The Housing Authority's trespass policy is such a law, and respondent's facial overbreadth challenge to it accordingly should not be entertained.

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[2] Even had respondent alleged that he wanted to enter Whitcomb Court in order to carry on a conversation with someone, a policy that prohibited trespassing for that purpose would "not have a sufficiently substantial impact on conduct protected by the First Amendment to render it unconstitutional." *City of Chicago* v. *Morales*, 527 U.S. 41, 52-53 (1999) (Opinion of Stevens, J.); see *City of Dallas* v. *Stanglin*, 490 U.S. 19, 23-25 (1989).

A. The Overbreadth Doctrine Is A Limited Exception To The General Rule Permitting Only As-Applied Constitutional Adjudication

1. The traditional rule is that "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973); see *Barrows* v. *Jackson*, 346 U.S. 249, 256 (1953) ("[E]ven though a party will suffer a direct substantial injury from application of a statute, he cannot challenge its constitutionality unless he can show that he is within the class whose constitutional rights are allegedly violated."). That rule is based on several rationales.

First, as-applied adjudication ensures that society's ability to enforce its laws is curtailed only where doing so would violate a constitutional command that the defendant's conduct must be protected. By contrast, overbreadth challenges eliminate society's ability to enforce laws even in cases in which the defendant's conduct is unprotected. See *Broadrick*, 413 U.S. at 615 (a holding that a law violates the First Amendment in an overbreadth case "prohibit[s] a State from enforcing the statute against conduct that is admittedly within its power to proscribe"). That curtailment of society's ability to protect itself from "harmful, constitutionally unprotected conduct," *ibid.*, is significant, and a court should not be "so ready to frustrate the expressed will of Congress or that of the state legislatures." *Barrows*, 346 U.S. at 256-257.

Second, while an as-applied challenge presents a court with a concrete factual setting in which to adjudicate the question whether the challenged regulation is genuinely inconsistent with the First Amendment, an overbreadth challenge deprives the court of such a concrete factual setting. Where a court can "focus[] on the factual situation"

before it, it has the opportunity to address "'flesh-and-blood' legal problems with data 'relevant and adequate to an informed judgment.'" *Los Angeles Police Dep't* v. *United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999) (quoting *New York* v. *Ferber*, 458 U.S. 747, 768 (1982)). But where the court must "consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation," *Barrows*, 346 U.S. at 256, reliable judgment becomes much more difficult.

Third, while an as-applied challenge requires a court to pass on a constitutional question because doing so is necessary to vindicate the Constitution with respect to the particular party before the court, overbreadth challenges can lead the Court to "unnecessary pronouncement on constitutional issues." *United States* v. *Raines*, 362 U.S. 17, 22 (1960). The court must address the constitutional challenge, even if the assertedly unconstitutional application of the statute on which the challenge is based never in fact arises or arises in a context in which different or narrower issues are presented.

2. Notwithstanding the above costs, because "the First Amendment needs breathing space," *Broadrick*, 413 U.S. at 611, overbreadth challenges under the First Amendment have been "deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." *Gooding* v. *Wilson*, 405 U.S. 518, 520-521 (1972). In essence, the party before the court, whose conduct may be regulated consistently with the First Amendment, is permitted to represent the interests of third parties not before the court whose speech would be chilled by the prospect that the regulation would be applied to them.

Nonetheless, the Court has emphasized that "[a]pplication of the overbreadth doctrine * * * is, manifestly, strong

medicine" that "has been employed by the Court sparingly and only as a last resort." *Broadrick*, 413 U.S. at 613. See *Ferber*, 458 U.S. at 769. In light of its heavy costs, the Court has restricted First Amendment overbreadth challenges in a number of respects. The Court has held that overbreadth challenges may succeed only on a showing that the law's overbreadth is substantial. "[T]he scope of the statute does not render it unconstitutional unless its overbreadth is not only 'real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.'" *Osborne* v. *Ohio*, 495 U.S. 103, 112 (1990) (quoting *Broadrick*, 413 U.S. at 615). "Even where a statute at its margins infringes on protected expression, 'facial invalidation is inappropriate if the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable * * * conduct.'" *Ibid.* (quoting *Ferber*, 458 U.S. at 770 n.25). The Court has also held that the First Amendment overbreadth doctrine does not apply to commercial speech, see *Bates* v. *State Bar of Ariz.*, 433 U.S. 350, 380-381 (1977), which is not easily chilled, and in the military context, see *Parker* v. *Levy*, 417 U.S. 733, 760-761 (1974).

B. An Overbreadth Challenge May Not Be Brought By One Not Engaged In Expressive Activity Subject To The Challenged Regulation

All of this Court's overbreadth cases have involved parties who engaged in, or sought to engage in, expressive activity subject to the challenged regulation. *E.g.*, *Watchtower Bible & Tract Soc'y of New York, Inc.* v. *Village of Stratton*, 536 U.S. 150 (2002) (restriction on door-to-door canvassing challenged by religious proselytizers); *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002) (restriction on virtual child pornography challenged by parties who create erotic and nudist works); *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123 (1992) (permit for private use of public property challenged by group that wanted to hold

demonstration); *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750 (1988) (newsrack licensing scheme challenged by newspaper); *Board of Airport Comm'rs* v. *Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (ban of all "First Amendment activities" challenged by party seeking to distribute religious literature); *Gooding* v. *Wilson*, 405 U.S. 518 (1972) (law prohibiting "opprobrious words or abusive language, tending to cause a breach of the peace" challenged by person convicted for using such language) (citation omitted); *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 153 (1969) (parade permit ordinance challenged by demonstrators); *Thornhill* v. *Alabama*, 310 U.S. 88, 97 (1940) (statutes prohibiting loitering with purpose to influence and picketing challenged by union picketer); *Lovell* v. *City of Griffin*, 303 U.S. 444 (1938) (licensing scheme for distribution of literature challenged by person distributing religious pamphlets).[3] The rule permitting overbreadth should not be extended to cases, such as this one, in which the party bringing the challenge has not engaged in expressive activity subject to the challenged regulation.

The costs of permitting such a challenge are high. If an individual who has not engaged in expressive activity subject to a regulation is permitted to bring an overbreadth challenge to that regulation, the damage to society's legitimate interest in enforcing its laws is even greater than in the

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[3] Even the cases in which this Court has ultimately rejected overbreadth challenges have involved parties engaged in expressive activity. *E.g.*, *Ashcroft* v. *ACLU*, 535 U.S. 564 (2002) (regulation of sexually explicit material on Internet challenged by organizations that maintain their own web sites); *Thomas* v. *Chicago Park District*, 534 U.S. 316 (2002) (permit scheme for gatherings in park challenged by parties seeking to hold political rallies); *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491 (1985) (obscenity law challenged by booksellers and movie distributors); *New York* v. *Ferber*, 458 U.S. 747 (1982) (law prohibiting child pornography challenged by proprietor of bookstore); *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973) (statute regulating government employees' political activity challenged by employees who had engaged in such activity).

ordinary overbreadth case, in which the challenger was engaged in expressive activity. For if the overbreadth doctrine is widened to permit challenges like the one in this case, enforcement of the challenged law is precluded not only against those engaged in expressive conduct, but also against the necessarily even wider category of individuals who have no claim to expression at all.[4] In this case, for example, if respondent's challenge is permitted, the Housing Authority's trespass policy could be invalidated entirely, so that the drug dealers, their customers, and other criminals who were the original targets of that policy could not be prohibited from entering the grounds of Whitcomb Court. That result would follow, despite the fact that none of those individuals has any claim to being engaged in expressive conduct and no personal First Amendment interest to protect.

The risk of premature or unnecessary constitutional adjudication, which is a cost of any overbreadth challenge, is increased if the party bringing the challenge has not himself engaged in expressive activity. Although respondent can hypothesize about the existence of speakers whose exercise of their First Amendment rights would allegedly be chilled by the Housing Authority's trespass policy, the record in this case does not clearly disclose that any individual who wanted to enter Whitcomb Court to engage in expressive activity—protected by the First Amendment or not—has

[4] Similarly, where a party's expressive activity was subject to the challenged regulation, there is always the possibility of a narrowing construction that would carve out certain expressive activity from the reach of that regulation, or a partial invalidation. Cf. *Board of Trs. of the State Univ. of New York* v. *Fox*, 492 U.S. 469, 484-485 (1989) (as-applied challenges to a restriction of speech should ordinarily be adjudicated before proceeding to an overbreadth analysis). But a party who has not engaged in expressive activity and is permitted to bring an overbreadth challenge has no such incentive to find a narrowing construction; such a party is likely to argue for the broadest possible invalidation of the challenged regulation, to ensure that it cannot be applied even to his, non-expressive conduct.

ever been, or would ever be, denied permission to do so.[5] See *City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 801 (1984) ("[T]here must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds."). Accordingly, cases like this one pose the risk that the Court must decide substantial constitutional questions under the First Amendment whose resolution is, in fact, wholly unnecessary. In light of the substantial costs of entertaining First Amendment overbreadth challenges to regulations by individuals not engaging in expressive activity subject to those regulations, this Court ought not extend the overbreadth doctrine to permit such challenges.

C. Facial Overbreadth Challenges May Not Be Brought To Laws Of General Applicability

There is a second, related reason why respondent's overbreadth challenge should not be entertained. Virtually all of this Court's overbreadth cases have involved challenges to laws that either regulate speech directly or regulate conduct closely associated with speech. See pp. 14-15, *supra* (citing

[5] When asked whether she has given permission to people who want to enter Whitcomb Court "to pass out flyers for example, or hold church related meetings," Ms. Rogers agreed with counsel's statement that "[s]ometimes you do and sometimes you don't." Pet. App. 101; see *id.* at 16. She went on, however, to state that "I do not deny anyone permission to hand out flyers, the ones that I have seen," *id.* at 102, that if it is "something [she is] uncomfortable with, [she] will refer it to [her supervisor]," *ibid.*, and that she also "refer[s]" matters "to the community council and they meet with the board and the residents to decide," *id.* at 101. In sum, her testimony establishes that she does not always personally grant permission. It does not concretely establish that anyone who has sought entry to Whitcomb Court to engage in expressive activity has ever been denied. Nor does it establish that anyone who has been engaged in expressive activity, whether with or without permission, has ever been arrested. J.A. 4-38, 46.

cases). Such laws are generally not susceptible to challenges such as this one, in which the party bringing the challenge has not engaged in expressive activity at all, because the regulation itself applies to few parties in that situation. Yet where the issue has arisen, this Court has stated that laws of general applicability, which apply to conduct that has little or nothing to do with speech, are not subject to facial overbreadth challenges, even though such laws could have an incidental effect on speech in particular instances. That principle precludes respondent's challenge in this case.

1. In *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750, 763-764 (1988), the Court entertained a facial challenge to an ordinance that gave the mayor of a city "unfettered discretion" to grant or deny applications for annual permits to place newsracks on city property and held that the ordinance was unconstitutional. 486 U.S. at 772. The Court held that facial challenges may be brought to laws that "have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of * * * censorship risks." *Id.* at 759. The Court held that, because the newsrack ordinance had to do with the distribution of newspapers, it satisfied that standard.

The Court in *City of Lakewood*, however, distinguished "laws of general application that are not aimed at conduct commonly associated with expression," such as "a law requiring building permits" or "a law giving the mayor unbridled discretion to decide which soda vendors may place their machines on public property." 486 U.S. at 760-761. The Court noted that facial challenges to such laws of general applicability would not be warranted, notwithstanding that they could be applied in violation of the First Amendment in particular cases, such as where an unpopular newspaper is refused a building permit or a soda vendor who has criticized the municipal government is denied a permit to place a

vending machine on public property. *Id.* at 761. As the Court explained, "such laws provide too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse." *Ibid.* See generally Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 860 (1970) ("[T]he primary conduct which is affected by the law at issue must to a substantial extent be the kind of expressive and associational behavior which at least has a colorable claim to the protection of the [First] amendment" in order for the overbreadth doctrine to be applied.).

2. Based on the above principles, the Court has generally entertained overbreadth challenges only to laws that undoubtedly target expression. See pp. 14-15, *supra* (citing cases). The limits of that principle involve cases such as *Thomas* v. *Chicago Park District*, 534 U.S. 316 (2002), and *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123 (1992). *Thomas* involved a facial overbreadth challenge to an ordinance that required a permit for any gathering of more than fifty persons in a public park. *Forsyth County* involved a challenge to an ordinance that was adopted "[a]s a direct result" of two street demonstrations and required a permit and fee for "parades, assemblies, demonstrations, road closings, and other uses of public property and roads by private organizations and groups of private persons for private purposes." 505 U.S. at 126 (citation omitted). Although the Court did not in either case address whether the challenged ordinances were sufficiently targeted at speech to satisfy *City of Lakewood*, the permit requirements in both cases applied not only to expressive activity, but to activity with little or no expressive component. At the same time, both ordinances appear to have applied solely to gatherings of groups of people in traditional public forums, and the ordinance in *Forsyth County* was specifically adopted as a result of such gatherings. Gatherings of people in a public forum are a characteristic of expressive activity and a traditional

function of public parks and streets. Cf. *Roberts* v. *United States Jaycees*, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak * * * and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."). The targeting at gatherings in a public forum would suggest that the ordinances in both cases regulated conduct that "ha[d] a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of * * * censorship risks." *City of Lakewood*, 486 U.S. at 759.[6]

This case, however, involves a trespass policy that, as the Virginia Supreme Court noted, "is designed to punish activities that are not protected by the First Amendment." Pet. App. 13. The policy was adopted "[i]n an effort to eradicate illegal drug activity in Whitcomb Court, which was described as an 'open-air drug market.'" *Id.* at 3. See *id.* at 29 n.1 (Housing Authority brochure listing "goals of street privatization" as, *inter alia*, "[t]o make communities safer by removing persons who commit unlawful acts which destroy the peaceful enjoyment of other residents," and "[t]o ensure that children have places to play free of drug paraphernalia and the danger of gunshots and other criminal activity"). The trespass policy punishes conduct—the entry on to

[6] In *Cox* v. *Louisiana*, 379 U.S. 536 (1965), and *Edwards* v. *South Carolina*, 372 U.S. 229 (1963), the Court addressed First Amendment challenges to breach-of-the-peace statutes as applied to the conduct of defendant civil rights demonstrators. *Cox*, 379 U.S. at 544-552; *Edwards*, 372 U.S. at 234-236. At the end of the Court's discussion in each case, it noted that the statutes would also be facially unconstitutional for overbreadth. *Cox*, 379 U.S. at 551-552; *Edwards*, 372 U.S. at 238. As the Court later explained in *Broadrick*, however, "[t]hese additional holdings were unnecessary to the dispositions of the cases" and were not relied on in a later case addressing a conviction under the same breach-of-the-peace statute at issue in *Cox*. 413 U.S. at 614 n.13 (internal quotation marks omitted).

Housing Authority property by people not authorized to be there—not speech. Unlike in *Thomas* or *Forsyth County*, the vast bulk of the conduct the Housing Authority trespass policy targets has nothing to do with expressive activity.

Like any trespass law, the trespass policy might on occasion apply to demonstrators, leafletters, or others attempting to engage in protected activity, and it could be unconstitutionally applied in those instances. See, *e.g.*, *Marsh* v. *Alabama*, 326 U.S. 501, 509 (1946) ("Insofar as the State [through its trespass law] has attempted to impose criminal punishment on appellant for undertaking to distribute religious literature in a company town, its action cannot stand."). But the Housing Authority's trespass policy by its nature is targeted at *anyone* who seeks to enter Whitcomb Court, and in particular at drug dealers, their customers, and other criminals who had frequented the property. Accordingly, the trespass policy, like the laws of general applicability the Court discussed in *City of Lakewood* or the trespass law in *Marsh* v. *Alabama*, applies very broadly to conduct that has little to do with speech. A First Amendment challenge to such laws should not be entertained in the absence of a claim of "actual misuse" in a given case. *City of Lakewood*, 486 U.S. at 761.

At the very least, overbreadth analysis should not encompass the potential invalidation of a general statute in its applications to conduct that has no arguable connection to speech or expression. Even if the statute has some speech-related applications and all of those applications could be challenged (and invalidated) through overbreadth doctrine, non-speech-related applications of the law should be left untouched. In this case, that would mean that, at a minimum, non-speech-related applications of the trespass policy at Whitcomb Court—that is, applications to conduct such as that engaged in by respondent—could not be challenged and facially invalidated under overbreadth principles.

D. The Housing Authority's Trespass Policy Is Not In Any Event Substantially Overbroad

If respondent, as a party who did not engage in expressive activity subject to the Housing Authority's trespass policy, is permitted to bring an overbreadth challenge to that policy, the challenge should in any event be rejected because the policy is not substantially overbroad. The overbreadth of the policy—the extent to which it actually affects constitutionally protected speech—is at most uncertain and marginal. By contrast, its plainly legitimate sweep extends to all instances in which the policy bars those who have no legitimate business or social purpose and who are not engaging in First Amendment protected activity from entering Whitcomb Court. Because the overbroad reach of the Housing Authority's trespass policy thus likely extends only to "marginal applications," *Ferber*, 458 U.S. at 770 n. 25 (citation omitted), and it has no "embracing sweep * * * over protected expression," *id.* at 771, it is not substantially overbroad.[7]

II. EVEN IF RESPONDENT MAY BRING THIS OVERBREADTH CHALLENGE, THE VIRGINIA SUPREME COURT ERRED IN DETERMINING THAT THE HOUSING AUTHORITY'S TRESPASS POLICY VIOLATES THE FIRST AMENDMENT

The Court of Appeals of Virginia, the intermediate state appellate court, held that the streets and sidewalks of Whitcomb Court were a public forum, Pet. App. 33-40, but see *id.* at 49-53 (dissenting opinion), and that the trespass policy could not pass the strict standard of scrutiny applicable to regulations forbidding access to such a forum, *id.* at 40-43. The Virginia Supreme Court "recognize[d] that the Court of Appeals decided this case on the basis that the Housing Authority's private streets constitute a public forum," but the court stated that it "need not resolve this issue * * * and we will reserve consideration of this issue for another day." *Id.* at 16. In fact, the legitimacy under the First Amendment of the Housing Authority's trespass policy likely turns on the forum analysis of the public property to which it was being applied. Accordingly, if this Court reaches the merits of respondent's First Amendment claim, it should reverse the Virginia Supreme Court's determination that the Housing Authority's trespass policy violates the First Amendment and remand for further appropriate proceedings.

A. The Constitutionality Of The Regulation In This Case Likely Turns On The Forum Classification Of The Government Property At Issue

1. "Th[is] Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). "To ascertain what limits, if any, may be placed on protected speech," the Court has "often focused on the 'place' of that speech, considering the nature of the forum the speaker seeks to employ." *Frisby* v. *Schultz*, 487 U.S. 474, 479 (1988); see *United States* v. *Kokinda*, 497 U.S. 720, 726 (1990) (plurality opinion). Indeed, "[t]he existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the

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[7] This Court has explained that the function of facial overbreadth adjudication, "a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." *Broadrick*, 413 U.S. at 615. The Housing Authority's trespass policy regulates conduct—entry on to Housing Authority property—not speech. Accordingly, the scope of the overbreadth doctrine as it applies to such a policy is "attenuated."

property at issue." *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983).

2. "In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed." *Perry Educ. Ass'n*, 460 U.S. at 45. Among the restrictions the First Amendment imposes on governmental regulation in such a forum is that officials must not be vested with unfettered discretion to regulate expressive activity.[8] But "[p]ublic property which is not by tradition or designation a forum for public communication is governed by different standards." *Id.* at 46. In such a location, "the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Ibid.* "[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Serv.* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981).

A corollary to that proposition is that, while this Court has invalidated laws that granted too much discretion to public officials to decide who would gain access to traditional First Amendment forums such as public streets and parks, the Court has never imposed similar requirements on regulations restricting access to nonpublic forums. See *Hale* v. *Department of Energy*, 806 F.2d 910, 917 (9th Cir. 1986). In *Greenburgh Civic Ass'ns*, for example, the Court held that authorized postal letterboxes are not public forums and that the postal service accordingly may limit the rights of others

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[8] See, *e.g.*, *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123 (1992); *City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 763-764 (1988); *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 153 (1969); *Kunz* v. *New York*, 340 U.S. 290, 293-294 (1951); *Niemotko* v. *Maryland*, 340 U.S. 268, 271 (1951); *Lovell* v. *City of Griffin*, 303 U.S. 444 (1938).

to deposit materials in such boxes. In reaching that conclusion, the Court specifically referred to the line of cases in which it had "not hesitated in the past to hold invalid laws which it concluded granted too much discretion to public officials" in traditional First Amendment forums. 453 U.S. at 130-131. But, having concluded that letterboxes are not public forums, the Court also concluded that those standards do not apply to letterboxes. *Id.* at 131 ("[W]e do not believe the First Amendment requires us to make that leap.").

The Court's conclusion in *Greenburgh Civic Ass'ns* was correct. Governments own and operate a wide variety of different types of property, including office buildings, housing projects, military bases, law enforcement facilities, and many more. Vesting a gatekeeper at a public park with discretion to permit or deny entry based on the gatekeeper's determination whether a person has an otherwise unspecified valid purpose would likely run afoul of this Court's public forum cases. But no case of this Court suggests that vesting an official at a publicly owned office building or apartment complex with discretion to determine whether a visitor seeks entry for a valid business or social purpose would violate the First Amendment. Indeed, "[t]here is little doubt that in some circumstances the government may ban the entry on to public property that is not a 'public forum' of all persons except those who have legitimate business on the premises." *United States* v. *Grace*, 461 U.S. 171, 177 (1983); see *Adderley* v. *Florida*, 385 U.S. 39 (1966) (jailhouse driveway not public forum); *Daniel* v. *City of Tampa*, 38 F.3d 546, 550 (11th Cir. 1994) (public housing property is "nonpublic forum," because "[t]he official mission of the Housing Authority is to provide safe housing for its residents, not to supply non-residents with a place to disseminate ideas," and "in practice, access to Housing Authority property is carefully limited to lawful residents, their invited guests, and

those conducting official business"), cert. denied, 515 U.S. 1132 (1995).

3. A governmental limitation on entry must nevertheless be reasonable and unrelated to a purpose to suppress speech because of disagreement with the speaker's view. See *Perry*, *supra*. Those requirements are satisfied here. The Housing Authority's trespass policy is reasonable as a means to help protect residents of Whitcomb Court from the drug dealers and criminals preying on them, and the desire to attack drug trafficking and other criminal activity at Whitcomb Court has nothing to do with a desire to suppress speech. Accordingly, if the Whitcomb Court property at issue in this case is not a public forum (or is not a forum at all), the government may properly vest the manager of the property with much broader authority to permit or deny entrance than would be permitted with respect to a public forum. How broad the discretion may be must be evaluated in light of particular facts. But at the threshold, a court must determine whether the property is a public forum.

B. The Virginia Supreme Court Erred Because It Failed To Decide Whether The Property Was A Public Forum

The Virginia Supreme Court erred in holding the official discretion in this case unconstitutional without first determining whether the Whitcomb Court property is a public forum. Nor is the status of the property entirely clear on this record. Neither the physical character of the property nor the fact that it likely was a public forum in the past is decisive in determining whether it is a public forum now. The issues that are decisive were not reached by the Virginia Supreme Court, and this Court ought not address those issues in the first instance.

1. Although respondent was arrested on a sidewalk, not all sidewalks are public forums. "The mere physical characteristics of the property cannot dictate forum analysis." *Kokinda*, 497 U.S. at 727 (plurality opinion). In *Greer* v. *Spock*, 424 U.S. 828, 831 (1976) (citation omitted), for example, regulations precluded "[d]emonstrations, picketing, sit-ins, protest marches, political speeches and similar activities" on a military base and also precluded "distribution or posting of any publication * * * without prior written approval" of the base commander. Unrestricted areas of the base, however, were otherwise freely open to the public on paved roads and footpaths, and no guard was ordinarily posted at the entrance. *Id.* at 830. The Court nonetheless held that the unrestricted areas of the base were not a public forum, *id.* at 835-837, and that the regulations prohibiting expressive activities were constitutional on their face and as applied to prohibit electioneering by civilians. *Id.* at 838. See *Kokinda*, 497 U.S. at 727 (plurality opinion) (noting that in *Greer* "[t]he presence of sidewalks and streets within the [military] base did not require a finding that it was a public forum"); *United States* v. *Albertini*, 472 U.S. 675, 684-686 (1985) (military base not public forum). Accordingly, under *Greer*, the mere fact that the area where respondent was walking in Whitcomb Court has the physical characteristics of a sidewalk does not establish that it is a public forum.

2. The fact that the sidewalk on which respondent was walking had once been a public sidewalk also does not establish that it is presently a public forum. The government may convert a traditional public forum into a nonpublic forum, so long as its actions are reasonable and taken for a legitimate purpose, and so long as it takes appropriate steps to make clear the changed nature of the forum. See *First Unitarian Church of Salt Lake City* v. *Salt Lake City Corp.*, 308 F.3d 1114, 1130 (10th Cir. 2002) ("The mere fact that a space is on what used to be a public street does not automatically render it a public forum."); *Hawkins* v. *City & County of Denver*, 170 F.3d 1281, 1287 (10th Cir.) ("The government may, by changing the physical nature of its property, alter it to such an extent that it no longer retains its

public forum status."), cert. denied, 528 U.S. 871 (1999). Indeed, "[i]n some sense the government always retains authority to close a public forum, by selling the property, changing its physical character, or changing its principal use." *International Society for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 699 (1992) (Kennedy, J., concurring in the judgment). Otherwise, "the State would be prohibited from closing a park, or eliminating a street or sidewalk, which no one has understood the public forum doctrine to require[.]" *Id.* at 699-700.

3. What is decisive in determining the forum classification of the sidewalk on which respondent was arrested is the extent to which it has in actual fact been closed off to the public, such that it has lost its former character as a public sidewalk. This Court noted in *Grace* that sidewalks "are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property." 461 U.S. at 179. That was critical in *Grace* with respect to the public sidewalks surrounding the Supreme Court grounds, because those sidewalks "are indistinguishable from any other sidewalks in Washington, D.C." *Ibid.* As the Court noted, distinguishing the sidewalk in *Grace* from the sidewalk on the military base in *Greer*, the sidewalk in *Grace* had "no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds that they have entered some special type of enclave." *Id.* at 179-180. Under those circumstances, the Court ruled that Congress had not succeeded in converting the sidewalks into a nonpublic forum simply by enacting a statute prohibiting certain expressive activities: Congress cannot "transform the character of the property by the expedient of including it within the statutory definition of

what might be considered a non-public forum parcel of property." *Ibid.*

Grace establishes that sidewalks are presumptively public forums, but *Greer* establishes that that presumption may be overcome. 461 U.S. at 179. Aside from *Grace*, this Court has not considered the analysis that is applicable when the government seeks to turn property that was a public forum to another use. Among the factors to consider in that analysis would be (1) whether the sidewalk and street in question are, as a practical matter, closed to the public; (2) whether the government has taken sufficient steps to make that closure clear to the public; and (3) whether the purpose served by the sidewalks and streets at issue is consistent with a finding that they have become a nonpublic forum. See *First Unitarian Church of Salt Lake City*, 308 F.3d at 1130-1131; *Hawkins*, 170 F.3d at 1287-1288; see also *Kokinda*, 497 U.S. at 728 (plurality opinion) ("location and purpose" of the property); *International Society for Krishna Consciousness*, 505 U.S. at 698-699 (Kennedy, J., concurring in the judgment).

4. The 6-5 division in the intermediate state appellate court was based largely on differing interpretations of the record concerning whether the street on which respondent was arrested remained a public forum. Compare Pet. App. 38 (majority opinion) ("Because the streets appear no different from other streets in Richmond and serve the same function they did prior to privatization, we can discern no reason why they should be treated any differently from any other street or sidewalk.") (internal quotation marks and citation omitted) with *id.* at 52 (dissenting opinion) (there was "notice to the residents and the public at large in the form of repeated and obvious signage that the streets and sidewalks were no longer 'public' in character"; "there is absolutely no evidence that the streets and/or sidewalks of the Whitcomb Court property remained open to a public flow

of traffic, as the majority suggests"). The Virginia Supreme Court did not reach that issue, and this Court ought not, as an original matter, decide whether, on the limited record in this case, the Housing Authority succeeded in its effort to convert the sidewalk at issue in this case into a nonpublic forum. Thus, even if the Court were to determine that a party in respondent's position may bring an overbreadth challenge, the Court should reverse the decision of the Virginia Supreme Court and remand for further proceedings, including a classification, under the public forum doctrine, of the sidewalk in Whitcomb Court on which respondent was arrested.

CONCLUSION

The judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted.

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MARCH 2003

No. 02-371

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
Petitioner,

v.

KEVIN LAMONT HICKS,
Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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25 pp

QUESTION PRESENTED

Amici will address the following question:

Whether a criminal defendant who has not engaged in speech or expressive conduct can bring a First Amendment overbreadth challenge to a conviction.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal officials throughout the United States.[1] *Amici* have a compelling interest in legal issues that affect state and local governments.

Amici confront daily the problem of protecting communities from criminal activity, a pernicious dilemma in public housing. The Supreme Court of Virginia held that respondent, who has three prior convictions "for misconduct at Whitcomb Court—two for trespass and one for damaging property," Pet.13, could raise a First Amendment overbreadth challenge in this, his third prosecution for trespass. The court then reversed respondent's conviction notwithstanding that he was not engaged in expressive activity at the time of the incident.

This holding is an erroneous and socially harmful expansion of the overbreadth doctrine. It imposes significant costs on law-abiding citizens by denying the State the power to punish criminal activity. Yet it is unnecessary to protect First Amendment rights, which is the overbreadth doctrine's purpose.

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resoiution of the case.

SUMMARY OF ARGUMENT

1. The Court has long recognized two fundamental rules of constitutional adjudication. The first is that constitutional rights "are personal and may not be asserted vicariously."

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[1] The parties have consented to the filing of this brief *amicus curiae* and their letters of consent have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici* or their members made a monetary contribution toward its preparation or submission.

Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973). The second is that a litigant whose conduct can be constitutionally proscribed cannot challenge a statute on the ground that it may be unconstitutionally applied to others not before the court. *See id.*

The Court has also recognized that the importance of the First Amendment warrants a limited exception to these rules. Thus, "when statutes regulate or proscribe speech . . . the transcendent value to all society of constitutionally protected expression is deemed to justify allowing attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Los Angeles Police Dep't v. United Reporting Pub. Corp.*, 528 U.S. 32, 38 (1999) (citations and internal quotation marks omitted).

The overbreadth doctrine is not, however, "casually employed." *Id.* at 39. Indeed, while the case for an overbreadth challenge is strongest when a statute regulates speech, the Court has also recognized that indiscriminate use of the doctrine imposes a substantial social cost by denying the government the power to punish criminal activity. The Court has thus greatly limited overbreadth challenges when litigants have invoked the doctrine to challenge the application of the criminal laws, even to expressive conduct. The Court has further held that "where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *New York v. Ferber*, 458 U.S. 747, 770 (1982) (citations and internal quotation marks omitted).

2. While the overbreadth doctrine is an exception to the longstanding prohibition against litigating the rights of third parties, this limitation is only one of three prudential standing rules. Most significantly, the Court has repeatedly held that

in order to confer standing, a plaintiff's claim must "fall within the zone of interests to be protected . . . by the . . . constitutional guarantee in question." *Valley Forge Christian College v. Americans United, Etc.*, 454 U.S. 464, 475 (1982) (citations and internal quotatio.. marks omitted).

The overbreadth doctrine does not override this fundamental rule of constitutional adjudication. In the sixty years of the overbreadth doctrine's existence, the Court has never recognized the right of a litigant to bring an overbreadth challenge when the litigant's conduct did not involve expressive activity. Such a challenge would be irreconcilable with the Court's teaching that the "function" of an overbreadth challenge "attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from pure speech toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." *Ferber*, 458 U.S. at 770 (citations and internal quotations omitted). Indeed, the function of an overbreadth challenge evaporates when the litigant has engaged in non-expressive criminal conduct. In such circumstances, there is no chilling of protected activity because the State's prosecution of non-expressive criminal conduct does not lead potential speakers to draw any inference concerning the government's regulation of speech.

The application of these principles to this case demonstrates that Hicks was not entitled to bring an overbreadth challenge. When confronted by the police, Hicks did not assert that he was on the Whitcomb Court grounds to engage in expressive activity. Rather, he stated he was "bringing pampers to his baby." Pet. App. 32a. Because Hicks' conduct is not within the "zone of interests" protected by the First Amendment, he is not entitled to bring a First Amendment overbreadth challenge to the Housing Authority's trespass-barment policy.

3. Beyond the fact that Hicks' conduct is not within the First Amendment's zone of interests, the record does not support a judicial prediction that the trespass-barment policy will chill others from engaging in protected activity. Contrary to the conclusion of the court below that Rogers (the manager of Whitcomb Court) has "unfettered discretion" to determine who can speak on the property, the record suggests that she referred those requests she was not comfortable granting to other authorities such as her supervisor, the Housing Authority's Assistant Director of Operations. *See* Pet. App. 101a-102a. The record also indicates that there was an established procedure for obtaining review of barment determinations. *See id.* at 62a. Moreover, there is no evidence that persons who sought to engage in expressive activity at Whitcomb Court were subject to criminal prosecution. *See id.* at 49a. There is thus no basis for concluding that facial invalidation of the policy is necessary to prevent the chilling of First Amendment rights, which is the purpose of the overbreadth doctrine.

Finally, the Court should reject Hicks' overbreadth challenge because the trespass-barment policy is not substantially overbroad. Criminal activity is a serious problem in public housing communities, both in Richmond and nationally. Several studies indicate that non-residents are responsible for the vast majority of criminal activity that occurs in public housing. It is thus an indisputably valid exercise of the police power to bar non-residents from Housing Authority grounds unless they have a legitimate social or business purpose for visiting. Indeed, the Housing Authority's exercise of power is no different from what many private landlords do to protect tenants by enforcing trespassing laws and regulating access to residential property. Given the tragically high crime rate that has afflicted Richmond's public housing tenants, the Housing Authority's purpose of keeping drug dealers, vandals, thieves and

murderers out of public housing projects demonstrates that the policy's "legitimate reach dwarfs its arguably impermissible applications." *Ferber*, 458 U.S. at 773.

ARGUMENT

A CRIMINAL DEFENDANT CANNOT CHALLENGE A CONVICTION UNDER THE OVERBREADTH DOCTRINE IF THE DEFENDANT DID NOT ENGAGE IN SPEECH OR OTHER EXPRESSIVE CONDUCT

The Supreme Court of Virginia erred in holding that respondent was entitled to a reversal of his conviction for trespassing on Richmond Redevelopment and Housing Authority (RRHA) property, on the ground that the Authority's "trespass policy is overly broad" and violates the First Amendment. Pet. App. 17a. Contrary to the views of the court below, this is not an appropriate case for judicial prescription of the "strong medicine" of the overbreadth doctrine. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Indeed, the manner in which the court below applied the doctrine was not only legally erroneous, but blatantly violated this Court's admonition just three years ago that "the overbreadth doctrine is not casually employed." *Los Angeles Police Dep't (LAPD) v. United Reporting Pub. Corp.*, 528 U.S. 32, 39 (1999).

As explained below, affirmance of the Virginia Supreme Court's use of the overbreadth doctrine to vacate respondent's conviction would mark an unprecedented expansion of the doctrine. Application of the doctrine to overturn respondent's criminal conviction for unlawful, non-expressive conduct would untether the doctrine from both its established purpose and core standing principles. In the approximately sixty years of the overbreadth doctrine's existence, this Court has never sanctioned its use by a litigant who did not seek to speak or otherwise engage in expressive conduct. This is because, as

this case demonstrates, application of the doctrine to invalidate a criminal conviction for non-expressive conduct imposes a significant cost on law-abiding citizens while being wholly unnecessary to protect First Amendment values. The judgment of the Virginia Supreme Court should therefore be reversed.

A. The Overbreadth Doctrine Is A Limited Exception To Traditional Standing Rules Prohibiting The Assertion Of The Rights Of Third Parties.

1. The Court has long recognized that the First Amendment overbreadth doctrine is an exception to the "traditional rules governing constitutional adjudication." *Broadrick*, 413 U.S. at 610. The first of these rules "is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Id.* (collecting cases). The second is the "closely related principle . . . that constitutional rights are personal and may not be asserted vicariously." *Id.* These rules reflect "two cardinal principles of our constitutional order: the personal nature of constitutional rights, and prudential limitations on constitutional adjudication." *New York v. Ferber*, 458 U.S. 747, 767 (1982) (internal citations omitted).

The rules serve several vital purposes. First, they improve the quality of judicial decisionmaking. As the Court has explained, "the legal questions presented to the court [should] be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Americans United*, 454 U.S. 464, 472 (1982). Thus, "'[b]y focusing on the factual situation before us, and similar cases necessary for the development of a constitutional rule, [the court] face[s] "flesh

and blood" legal problems with data "relevant and adequate to an informed judgment."'" *LAPD*, 528 U.S. at 39 (quoting *Ferber*, 458 U.S. at 768).

Second, the rules preserve the independence of the legislative and executive branches by ensuring that the courts do not act as "roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick*, 413 U.S. at 611. The overbreadth doctrine is strictly circumscribed because allowing litigants to bring overbreadth challenges to statutes in any but the most compelling circumstances would result in "the States [being] stripped of all power to prosecute even the socially dangerous and constitutionally unprotected conduct that had been covered by the statute, until a new statute could be passed by the state legislature and approved by the . . . courts." *Younger v. Harris*, 401 U.S. 37, 51 (1971). It is a substantial encroachment on legislative prerogatives to invalidate a statute on its face when the statute can be constitutionally applied to a litigant. *Cf. Ferber*, 458 U.S. at 769. "Absent 'weighty countervailing' circumstances," the Court has "adhered to" these rules. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985) (quoting *United States v. Raines*, 362 U.S. 17, 22 (1960)).

2. The Court has recognized that the importance of First Amendment values within the constitutional scheme warrants a limited exception to the traditional limitations on constitutional adjudication. As the Court recently reiterated, "'[a]t least when statutes regulate or proscribe speech . . . the transcendent value to all society of constitutionally protected expression is deemed to justify allowing attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" *LAPD*, 528 U.S. at 38 (quoting *Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972)) (other quotation and citation omitted). The Court has further explained that the

First Amendment overbreadth doctrine "'is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their right for fear of criminal sanctions provided by a statute susceptible of application to protected expression.'" *Id.* (quoting *Gooding*, 405 U.S. at 520-21).

The Court has made clear that "like most exceptions to established principles," the overbreadth doctrine's use "must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted." *Ferber*, 458 U.S. at 769. Recognizing "the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment," *id.*, application of the overbreadth doctrine "is, manifestly, strong medicine[,]" and "has been employed by the Court sparingly and only as a last resort." *Broadrick*, 413 U.S. at 613.

The case for facial invalidation is strongest when a statute regulates speech. *See id.* "Equally important, overbreadth claims, if entertained at all, have been curtailed when invoked against ordinary criminal laws that are sought to be applied to protected conduct." *Id.*

As the Court has further explained, the justification for allowing overbreadth challenges "attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." *Id.* at 615. Accordingly, even though "such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe." *Id.* The Court has

thus "held that 'particularly where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.'" *Ferber*, 458 U.S. at 770 (quoting *Broadrick*, 413 U.S. at 615).

"The requirement of substantial overbreadth is directly derived from the purpose and nature of the doctrine." *Ferber*, 458 U.S. at 772. Indeed, in most of this Court's cases "involving facial invalidation, the Court has stressed the embracing sweep of the statute over protected expression." *Id.* at 771. Nearly every statute can conceivably be applied in some unconstitutional manner. Therefore, unless a statute "reaches a substantial number of impermissible applications[,]" it cannot be presumed that the law "'set[s] up the kind and degree of chill that is judicially cognizable.'" *Id.* at 771-72 & n.27 (quoting Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 859 n.61 (1970)).[2]

3. Because of the high societal costs of allowing those who engage in criminal conduct to escape punishment, the Court has further instructed that courts should determine whether less intrusive measures can resolve a First Amendment problem. Thus, when faced with an overbreadth challenge a court should attempt to give a statute a narrowing construction to avoid a First Amendment question. *See Ferber*, 458 U.S. at 769 n.24. "Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute. *Broadrick*, 413 U.S. at 613 (collecting cases).

Moreover, even when a statute "is not subject to a narrowing construction and is impermissibly overbroad, it

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[2] The requirement of substantial overbreadth is as "justifiably . . . applied to statutory challenges which arise in defense of a criminal prosecution as well as civil enforcement or actions seeking a declaratory judgment." *Ferber*, 458 U.S. at 772-73.

nevertheless should not be stricken down on its face; if it is severable, only the unconstitutional portion is to be invalidated." *Ferber*, 458 U.S. at 769 n.24. When either a narrowing construction or partial invalidation result in "the invalid reach of the law [being] cured, there is no longer reason for proscribing the statute's application to unprotected conduct." *Id.; see also Broadrick*, 413 U.S. at 613; *Osborne v. Ohio*, 495 U.S. 103, 113-14 (1990) (rejecting overbreadth challenge on grounds that state court had construed statute in manner that "plainly survives strict scrutiny"). Accordingly, it is "the normal rule that partial, rather than facial, invalidation is the required course." *Brockett*, 472 U.S. at 504.

B. The Supreme Court of Virginia's Holding Is An Unprecedented and Erroneous Expansion Of This Court's Overbreadth Doctrine

The Supreme Court of Virginia held that respondent is entitled to challenge his criminal conviction by asserting a First Amendment overbreadth challenge to the Richmond Housing Authority's trespass-barment policy. The court did so notwithstanding that respondent, who has two prior convictions for trespassing and one prior conviction for damaging property at Whitcomb Court, made no claim to the police that he was on the property to engage in expressive activity at the time of his offense. Contrary to the views of the court below, this Court's cases do not support such casual use of the overbreadth doctrine. Indeed, to allow an overbreadth challenge under the facts of this case would lead to an unprecedented and erroneous expansion of the doctrine. The judgment of the Supreme Court of Virginia should therefore be reversed.

1. As discussed above, the overbreadth doctrine "is an exception to the traditional rule that 'a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the court.'" *LAPD*, 528 U.S. at 39 (quoting *Ferber*, 458 U.S. at 767 (citing *Broadrick*, 413 U.S. at 610)). The prohibition against litigating the rights of third parties is, however, only one of the three prudential standing limitations recognized by this Court.

Most significantly, the Court has repeatedly held that in order to confer standing, a plaintiff's claim must "fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Valley Forge Christian College v. Americans United, Etc.*, 454 U.S. 464, 475 (1982) (quoting *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)). The overbreadth doctrine does not override this fundamental rule of constitutional adjudication.

The Court has recognized the overbreadth doctrine for more than sixty years. *See* Richard H. Fallon, *Making Sense of Overbreadth*, 100 Yale L.J. 853, 863 & n.58 (1991) (tracing doctrine's origin to *Thornhill v. Alabama*, 310 U.S. 88 (1940)). In *Thornhill*, the overbreadth challenger, who had been convicted of loitering and picketing, was engaged in expressive activity. *See* 310 U.S. at 91-95. Thornhill's challenge thus was clearly within the zone of interests protected by the First Amendment. *See id.* at 102.

Since *Thornhill* the Court has not recognized the right of a litigant to bring an overbreadth challenge when the litigant's conduct did not involve expressive activity. Indeed, allowing such a challenge is irreconcilable with this Court's teaching that the "function" of an overbreadth challenge "'attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct—*even if expressive*—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls

over harmful, constitutionally unprotected conduct.'" *Ferber*, 458 U.S. at 770 (quoting *Broadrick*, 413 U.S. at 615) (emphasis added).

If the function of an overbreadth challenge attenuates as proscribed activity moves from pure speech to expressive conduct, it evaporates when the litigant engages in non-expressive criminal conduct. To allow a criminal defendant to bring an overbreadth challenge when his conduct does not involve expressive conduct, much less speech, imposes a substantial social cost by denying the State the power to punish "conduct that is admittedly within its power to proscribe" and to protect the community. *Id.* (quoting *Broadrick*, 413 U.S. at 615). Non-expressive criminal conduct therefore falls outside the scope of the over-breadth doctrine.

Indeed, the justification for allowing an overbreadth challenge does not exist where, as here, a State criminally prosecutes a person for engaging in non-expressive conduct. When the State prosecutes a person for engaging in expressive but unprotected conduct, it is sometimes reasonable for a court to predict that other potential speakers will be deterred because they perceive that the government will prosecute them for engaging in speech or protected activity. In contrast, when the State prosecutes non-expressive conduct, potential speakers are not likely to draw any inference concerning the government's regulation of speech. The only reasonable inference is that the government is likely to prosecute persons who engage in criminal activity.

When asked by a police officer why he was on Whitcomb Court grounds, Hicks did not say that he was there to engage in expressive activity. Rather, he stated that he was "bringing pampers to his baby," Pet. App. 32a, conduct that clearly does not implicate the First Amendment. Virginia's prosecution of Hicks for trespassing is thus unlikely to chill speakers from exercising their First Amendment rights. Because Hicks' conduct is not within the zone of interests protected by the

First Amendment, he is not entitled to bring a First Amendment overbreadth challenge to the Housing Authority's trespass-barment policy.

2. The Supreme Court of Virginia erred in sustaining Hicks' challenge for two additional reasons. First, the record does not support a judicial prediction that the trespass-barment policy will cause other "'persons whose expression is constitutionally protected [to] refrain from exercising their right for fear of'" being subject to some sanction. *LAPD*, 528 U.S. 32, 38 (quoting *Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972)). Second, even if the trespass-barment policy results in the unconstitutional suppression of some protected expressive activity, the policy's overbreadth is insubstantial when "judged in relation to the [policy's] plainly legitimate sweep." *Broadrick*, 413 U.S. at 615.

While Hicks was convicted of violating Virginia's criminal trespass statute, *see* Va. Code § 18.2-119, his overbreadth challenge is not to this statute but rather to the unwritten portion of the Housing Authority's trespass-barment policy. *See* Pet. App. 2a, 13a-14a; *see also* Opp. 1. But to the extent this Court's cases contemplate an overbreadth challenge to an unwritten policy such a challenge will, as this case demonstrates, frequently be unfounded.

The Supreme Court of Virginia relied on *Niemotko v. Maryland*, 340 U.S. 268 (1951), to support the proposition that Hicks was entitled to bring a facial challenge to the Authority's policy "even though a portion of that policy is unwritten." Pet. App. 13a-14a. While an unwritten policy was at issue in *Niemotko*, *see* 340 U.S. at 269-70, the case did not involve an overbreadth challenge. Rather, *Niemotko* involved a classic, as applied, First Amendment challenge. Moreover, in stark contrast to this case, the litigants in *Niemotko* established the scope and substance of the challenged policy with clarity. And in *Niemotko*, there was extensive evidence that protected expression had been

prohibited solely based on its content, a paradigmatic First Amendment violation. *See* 340 U.S. at 272.

In *Niemotko*, the Court reversed the convictions of two members of a religious group who were convicted of disorderly conduct after they conducted a bible talk in a public park without obtaining a permit. *See generally* 340 U.S. at 269-73. The city did not have an ordinance regulating use of the park. *Id.* at 269. The Court noted, however, that "it has been the custom for organizations and individuals desiring to use [the park] for meetings and celebrations of various kinds to obtain permits from the Park Commissioner." *Id.* Moreover, it was also "the custom of the municipality [that] there is a right of appeal to the City Council from the action of the Park Commissioner." *Id.* at 270.

The sect members first unsuccessfully applied to the Park Commissioner for a permit. *Id.* at 269. They then filed an appeal with the City Council, which denied their request after a public hearing. *Id.* at 270. Thereafter, the sect members proceeded to hold two separate meetings in the Park; each of the two members was arrested upon the commencement of each meeting and charged with disorderly conduct for using the park without a permit. *Id.* Following a jury trial, both sect members were convicted. *Id.*

This Court reversed the convictions. The Court began by noting that "[a]t the time of the arrest of each of these appellants, there was no evidence of disorder, threats of violence or riot. There was no indication that the appellants conducted themselves in a manner which could be considered as detrimental to the public peace or order[,]" and the police had testified "that each of the appellants had conducted himself in a manner beyond reproach." *Id.* at 271. The Court thus concluded that it was "quite apparent that any disorderly conduct which the jury found must have been based on the fact that appellants were using the park without a permit." *Id.*

The Court then turned to whether the City's permit system was constitutional. The Court explained that "all that is here is an amorphous 'practice,' whereby all authority to grant permits for the use of the park is in the Park Commissioner and the City Council. No standards appear anywhere; no narrowly drawn limitations; no circumscribing of this absolute power; no substantial interest of the community to be served." *Id.* at 271-72. Noting specifically that the Mayor had testified that "within his memory permits had always been issued for religious organizations and Sunday-school picnics," *id.* at 272-73, and that the City had granted a permit to the Elks to hold a Flag Day ceremony in the park on one of the days for which the sect had sought a permit, *id.* at 273, the Court reached the "inescapable" conclusion "that the use of the park was denied because of the City Council's dislike for or disagreement with the [Jehovah's] Witnesses or their views." *Id.* at 272.

The conduct of the two sect members in *Niemotko* clearly was protected, expressive activity, and could not be proscribed based on officials' disagreement with their views. *Niemotko* was thus not an overbreadth case, but rather, an as applied challenge. *See Brockett*, 472 U.S. at 504. And as the Court made clear in *Brockett*, an overbreadth challenge is not appropriate "where the parties challenging the statute are those who desire to engage in protected speech that the overbroad statute purports to punish." *Id. Niemotko* thus does not support an overbreadth challenge to an unwritten policy.

Moreover, even assuming that the Court's cases contemplate overbreadth challenges to unwritten policies (in addition to as applied challenges), overbreath challenges can be highly problematic because they lack the factual development necessary to determine the scope and substance of the policy. For example, while in *Niemotko* the Court was required to determine the contours of an unwritten policy, the fact that the case arose out of a concrete application of the policy ensured adequate development of the record. Indeed, in

Niemotko, the record included the testimony of the Mayor, an official who clearly possessed policy-making authority over the city's parks. *See* 340 U.S. at 272-73.

In this case, by contrast, no such certainty exists with respect to the policy at issue. Here, the Supreme Court of Virginia relied on excerpts of the testimony of a single RRHA employee—Rogers, the Whitcomb Court housing manager, who manages just one of the Housing Authority's developments—to determine the scope of the Authority's trespass-barment policy.[3] *See* Pet. App. 14a.

"Based upon the record before [the c]ourt," *id.* at 16a, the Virginia Supreme Court concluded that Rogers was "the government official who determines whether an individual is authorized" to "use the property." *Id.* at 14a. The court then selectively read Rogers' testimony, asserting that the record demonstrated that:

> Rogers has *the unfettered discretion* to determine not only who has a right to speak on the Housing Authority's property, but she may prohibit speech that she finds personally distasteful or offensive even though such speech may be protected by the First Amendment. She may even prohibit speech that is political or religious in nature.

Pet. App. 16a (emphasis added). *But cf. id.* at 21a (Kinser, J., dissenting) (RRHA's policy "is not aimed at censoring particular groups or viewpoints, or prohibiting individuals from distributing leaflets . . . . It seeks to regulate the criminal act of trespassing.").

Rogers' testimony does not, however, establish that she has unfettered discretion to suppress expressive activity. While her testimony was that she sometimes did not affirmatively

[3] The trial court did not hear any testimony from other RRHA officials, such as Rogers' supervisor.

grant permission to potential speakers, Rogers simultaneously explained (in a passage not cited by the majority opinion) that she referred some requests to other decisionmakers. *See id.* at 101a.

Rogers testified that she referred some matters to the "community council," *id.*, and some matters to her supervisor, the assistant director of housing operations. *See id.* at 102a. Nothing in the record indicates that Rogers failed to forward requests that she did not affirmatively grant to these other decisionmakers, let alone did so on the basis of their content. *See* Pet. App. 98a-103a. Moreover, Rogers "indicated that there was a process for having a barment lifted by submitting a written request through the Authority's director of housing operations." *Id.* at 62a (opinion of Virginia Court of Appeals).

The record thus clearly does not support the pivotal conclusion of the majority below: that "Rogers has the *unfettered discretion* to determine . . . who has a right to speak on the Housing Authority's property." Pet. App. 16a (emphasis added). Furthermore, the fact that Rogers did not herself grant access to every person requesting it does not mean that these persons were prohibited from speaking and threatened with arrest if they did so. *See id.* at 101a; *see also id.* at 49a (Virginia Court of Appeals en banc) (Humphreys, J., dissenting).

Based on this record, no court can predict with confidence that the trespass-barment policy will "cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick*, 413 U.S. at 612. By contrast, in a typical overbreadth case, there must be a reasonable probability that governmental authorities will criminally prosecute those who violate the statute. *See LAPD*, 528 U.S. at 40-41 (discussing *Gooding* and *National Endowment for Arts v. Finley*, 524 U.S. 569 (1998)).

Thus, while Hicks—a convicted vandal and trespasser—was subjected to criminal prosecution, there is no evidence that any person who sought to engage in expressive activity at Whitcomb Court was subjected to similar treatment. In fact, as the dissenting opinion in the *en banc* court of appeals recognized, "unauthorized individuals are *not automatically arrested*, but . . . are warned that they are not to enter the property in the future." Pet. App. 49a (emphasis added); *cf. LAPD*, 528 U.S. at 41 (rejecting facial challenge on ground that "[n]o threat of prosecution . . . or cutoff of funds . . . hangs over [the] heads" of parties not before the Court; "They may seek access under the statute on their own just as respondent did, without incurring any burden other than the prospect that their request will be denied.").

Moreover, there is no reason to allow Hicks to bring an overbreadth challenge on behalf of those who seek to engage in expressive activity, because in the event a potential speaker is denied permission to enter Whitcomb Court they can sue for injunctive relief, *see* 42 U.S.C. § 1983, and, if successful, obtain attorneys' fees.[4] *See id.* § 1988. Given the remedies available to those who may unsuccessfully seek to engage in expressive activity on RRHA property, the "strong medicine" of overbreadth is not necessary to cure any potential chill to First Amendment rights caused by RRHA's trespass policy.

Indeed, because such a suit will be based on the Authority's actual application of the policy to a prospective speaker, the courts will decide the case based not on speculation, but rather on "a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge*, 454 U.S. at 472. In such an as applied challenge, the constitutional question of whether the Authority's policy

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[4] Under this Court's section 1983 jurisprudence, a potential speaker is not required to exhaust the Housing Authority's administrative remedies. *See, e.g., Patsy v. Board of Regents*, 457 U.S. 496, 516 (1982).

violates the First Amendment will be clearly framed. *See, e.g., Niemotko*, 340 U.S. at 271-73. And even if the lower courts ultimately determine that it does, an as applied challenge will not impose the heavy cost of stripping the Authority of power to enforce its trespass-barment policy against those persons, such as Hicks, who engage in criminal conduct. *See Younger*, 401 U.S. at 51; *cf. Ferber*, 458 U.S. at 769 n.24 (courts should give limiting construction to laws challenged on overbreadth grounds).

3. Finally, the Court should reject Hicks' overbreadth challenge because the Housing Authority's trespass-barment policy is not substantially overbroad. *See Broadrick*, 413 U.S. at 615. As explained below, the policy's potential to chill speech is insubstantial when "judged in relation to [its] plainly legitimate sweep" and thus the policy does not warrant facial invalidation. *Id.*

Criminal activity is a serious problem in public housing communities, both in Richmond and in numerous other cities nationwide. *See HUD v. Rucker*, 535 U.S. 125, 127 (2002) (quoting 42 U.S.C. § 11901(3)); Br. *Am. Cur.*, City of Richmond & RRHA on pet., 1-9. Moreover, in Richmond as elsewhere non-residents are responsible for "the vast majority of crimes" that occur in public housing. *See* Pet. App. 3a; Abt Associates Inc., *Public Housing Drug Elimination Program Resource Document: Case Studies Prepared for U.S. Department of Housing and Urban Development* 83-84 (1994) (discussing public housing in Dade County, Florida). *See also Drugs In Federally Assisted Housing: Hearing Before the Subcommittee on Housing and Urban Affairs of the Senate Committee on Banking, Housing, and Urban Affairs*, 101st Cong. 110 (1989) (statement of Director of Chicago Housing Authority that in late 1980's, "80 percent of [Chicago Housing Authority] crime [was] committed by unauthorized or nonresidents"); *id.* at 134 (1989) (statement of James Moran, then-mayor of Alexandria, Va., July 20,

1989) ("[T]he vast majority of public housing tenants . . . are law abiding residents . . . who are not involved in illegal drug activities."). *See also* Pet. App. 3a.

Given that most crimes in public housing are committed by non-residents, it is an indisputably valid exercise of the police power to bar non-residents from Housing Authority grounds unless they have a legitimate social or business purpose for visiting. Indeed, the Housing Authority's trespass policy is no different from what many private landlords do to protect tenants by enforcing trespass laws and regulating access to residential property. Given the tragically high crime rate that has afflicted Richmond's public housing tenants, RRHA's purpose of keeping drug dealers, vandals, rapists, thieves, and murderers out of the city's public housing developments demonstrates that the policy's "legitimate reach dwarfs its arguably impermissible applications." *Ferber*, 458 U.S. at 773.

CONCLUSION

The judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted,

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March 7, 2003

Supreme Court, U.S.
FILED
MAR 7 2003

(8)

No. 02-371

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

vs.

KEVIN LAMONT HICKS,

Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. May a public housing project exclude from formerly public streets, abandoned by the city and now owned by the project, persons with no legitimate business on project property?

2. May the policy of exclusion be implemented with discretion in the project managers to decide when access by nonresidents is compatible with the best interests of the project residents?

3. Do the answers to Questions 1 and 2 depend on whether the streets have lost their status as "public forum" property?

4. If the trespass policy is invalid in some applications, is it void in its entirety?

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IN THE

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COMMONWEALTH OF VIRGINIA,

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Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to criminal justice in order to protect and advance the rights of victims of crime and the law-abiding public.

The opinion of the Virginia Supreme Court in the present case threatens the ability of public housing authorities to protect some of the most vulnerable people in America from the domination of violent, drug-dealing criminal gangs. The state court reached this result in an opinion which seriously misunderstands and misstates this Court's First Amendment jurispru-

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

dence. Genuine freedom of speech can be fully protected with far less violence to the state's ability to protect the residents of public housing. The state court's unnecessary hindrance of that ability is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Whitcomb Court is a public housing development owned by the Richmond Redevelopment and Housing Authority (RRHA). To improve the safety of Whitcomb Court, RRHA and the City of Richmond attempted to "privatize" the streets surrounding and adjacent to the project. *Hicks* v. *Commonwealth*, 36 Va. App. 49, 52, 548 S. E. 2d 249, 251 (2001). The city adopted an ordinance deeding the streets to RRHA. *Id.*, at 52-53, 548 S. E. 2d, at 251. The ordinance provided that those streets were to be closed to public use and travel. *Id.*, at 52, 548 S. E. 2d, at 251. Although those streets and sidewalks were not physically blocked off and remained open to vehicular and pedestrian traffic, "private property, no trespass" signs were posted every 100 feet on each block. *Id.*, at 53, 548 S. E. 2d, at 251. After the streets were deeded, RRHA adopted a "barment-trespass procedure" to keep "unauthorized persons" from entering Whitcomb Court property. *Ibid.* This policy authorized sworn city police officers to enforce Virginia's trespass laws on the deeded streets against unauthorized persons. *Id.*, at 53, 548 S. E. 2d, at 251-252. Authorized persons include residents, employees of Whitcomb Court, and those who can "demonstrate a legitimate business or social purpose for being on the premises." *Id.*, at 53, 548 S. E. 2d, at 252.

In 1998, the defendant, Kevin Hicks, had been banned from Whitcomb Court property after being twice convicted of trespassing and of damaging Whitcomb Court property. *Id.*, at 54, 548 S. E. 2d, at 252. In January 1999, Hicks was seen on one of the "privatized" streets adjacent to Whitcomb Court and was cited for trespassing. *Ibid.* He was later convicted of the charge in general district court. *Id.*, at 55, 548 S. E. 2d, at 252.

Hicks appealed to the circuit court of the City of Richmond and filed a motion to dismiss the trespass charge on the ground that RRHA's trespass policy violated the First and Fourteenth Amendments. *Ibid.* The circuit court denied the motion and found Hicks guilty of trespass. *Ibid.*

Hicks appealed the judgment to the Virginia Court of Appeals. *Commonwealth* v. *Hicks*, 264 Va. 48, 51, 563 S. E. 2d 674, 676 (2002). A panel of the Court of Appeals affirmed the judgment, but the court en banc reversed, holding that the streets remained public forums, and that RRHA's trespass policy violated the First and Fourteenth Amendments as applied to public forum property. *Ibid.* The Virginia Supreme Court affirmed on the basis that RRHA's trespass policy was overly broad, without resolving the public forum status of the streets. *Id.*, at 60, 563 S. E. 2d, at 681.

This Court granted Virginia's certiorari petition on January 24, 2003.

SUMMARY OF ARGUMENT

The Virginia Court of Appeals in the present case asked the correct question and narrowly divided on the answer. The critical question is whether the City of Richmond successfully terminated the "public forum" status of the streets in question. The Virginia Supreme Court's decision that the trespass policy is invalid regardless of whether the streets are a public forum is not a "narrow" decision, as the opinion claims, but rather is a broad, damaging, and incorrect decision.

Crime in public housing projects today devastates the lives of those who must live there. The efforts undertaken by public housing authorities to protect the residents from crime are vitally important, and any proposed rule which would interfere with those efforts, such as the one adopted by the Virginia Supreme Court in the present case, requires the closest scrutiny.

The Virginia Supreme Court has confused the overbreadth doctrine with the vagueness doctrine. Overbreadth as such is not a constitutional defect, but rather the basis for holding a statute void in its entirety when it has some valid applications and some invalid applications. The overbreadth doctrine should not be applied when the chilling effect on protected speech can be eliminated by cleanly severing the valid from the invalid applications. If any of the property of Whitcomb Court is found to be a public forum, the trespass policy should remain in effect for the nonpublic portion, just as the statute at issue in *United States* v. *Grace* remains in effect for all of the grounds of this Court except the sidewalks adjacent to the public streets.

The "excessive discretion" line of cases does not apply to nonpublic forum property. This is the heart of the distinction between public and nonpublic forums. The Virginia Supreme Court's holding that it can resolve this point without deciding whether the property is a public forum disregards the clear holdings of this line of cases. While the discretion to exclude speakers from a nonpublic forum has limits, and the application of the discretion may be subject to judicial scrutiny, the existence of such discretion does not make the trespass policy invalid and does not support a facial challenge.

ARGUMENT

The Virginia Court of Appeals en banc asked the correct question and divided 6-5 on the answer. The key question is whether the City of Richmond had successfully transformed the streets in question from a public forum to a nonpublic forum. On the particular facts of this case, the majority thought it had not, *Commonwealth* v. *Hicks*, 36 Va. App. 49, 59, 548 S. E. 2d 249, 254 (2001), but the five dissenting judges thought it had. *Id.*, at 70, 548 S. E. 2d, at 260 (Humphreys, J., dissenting). The narrow division on the public forum question is not surprising, as this issue has proven difficult in borderline cases. See *United States* v. *Kokinda*, 497 U. S. 720 (1990) (no majority

opinion); *Lee* v. *International Soc. for Krishna Consciousness, Inc.*, 505 U. S. 830 (1992) (*per curiam* decision without opinion, disparate separate opinions). If the majority is correct, then the defendant has a substantial argument for the invalidity of the trespass policy *as applied to the streets* under *Chicago* v. *Morales*, 527 U. S. 41 (1999) and *United States* v. *Grace*, 461 U. S. 171 (1983). However, the Court of Appeals distinguished its own prior decisions and a decision of the Eleventh Circuit regarding similar policies on *nonpublic* housing authority property, see 36 Va. App., at 59-60, 548 S. E. 2d, at 254-255, so that its decision did not threaten the ability of public housing authorities to enforce such policies in most situations.

If the Virginia Supreme Court had affirmed on the same basis, this case, although important, would have been too narrow and too fact-specific to have met the criteria for review on writ of certiorari in this Court. See Supreme Court Rule 10.1. Instead, the state high court declared that the trespass policy was invalid *regardless* of whether the property was a public forum or a nonpublic forum, astonishingly declaring this to be a "narrow" decision. See *Commonwealth* v. *Hicks*, 264 Va. 48, 60, 563 S. E. 2d 674, 681 (2002). In so holding, the Virginia Supreme Court confused the overbreadth doctrine with the "unfettered discretion" cases, ignored the explicit holding of this Court's landmark case on forum analysis, and seriously impaired the ability of the government to protect its poorest citizens from the scourge of crime.

I. Protecting the residents of public housing projects from crime is a compelling interest and requires strong action.

Criminal activity in public housing communities is running rampant and constitutes an enormous problem throughout the nation. Residents of public housing developments are in continual fear of being the next victim in the constant stream of

criminal activity that takes place right before their eyes every day. For example, in Tennessee,

> "Nashville teenager, Eric Harvey Hazelitt, was fatally shot in the chest when gunfire erupted at the John Henry Hale public housing complex in Nashville. Just 14 years old, Hazelitt was often seen riding his bike, helping older neighbors shop, or emptying the trash. Witnesses said Hazelitt got caught in the crossfire of two groups shooting at each other." See U. S. Dept. of Housing and Urban Development, In the Crossfire: The Impact of Gun Violence on Public Housing Communities 34 (c. 2000) ("In the Crossfire").

In Virginia, "[a] woman was shot in the head and killed at the Gilpin Court public housing development while standing next to a pay telephone." *Id.*, at 35. In Washington, D.C.,

> "[a] 55-year-old grandmother, Helen Foster-El, was gunned down by two stray bullets fired by feuding young men as she tried to usher neighborhood children to safety. Parents in the East Capitol Dwellings public housing development said they give their children survival instructions on what to do when shooting erupts, because it happens so often." *Id.*, at 31.

Finally, in Maryland, "Byron Antoine Jones, 22, was fatally shot near the front stoop of his girlfriend's Annapolis Gardens duplex. The shooting at the public housing community was apparently the result of an earlier altercation at Club Hollywood, a nearby nightclub." *Id.*, at 32.

Drug trafficking, gang activity, prostitution, assaults, rapes, burglaries, and the constant sound of random gunfire are but a few examples of what public housing residents must face every day. Most of this criminal activity is the responsibility of nonresidents who effectively make residents prisoners in their own homes out of fear. See U. S. Dept. of Justice, Office of Justice Programs, National Institute of Justice, Research in brief, B. Webster & E. Connors, The Police, Drugs, and Public Housing 1 (June 1992) ("Webster & Connors"); see also U. S. Dept. of Housing and Urban Development, One Strike and You're Out Policy in Public Housing 11 (March 1996).

"In 1998, there were an estimated 360 gun-related homicides in 66 of the Nation's 100 largest public housing authorities—*an average of nearly one gun-related homicide per day.*" In the Crossfire, *supra*, at 2 (emphasis added). In some developments, preschool-aged children have learned not to enter open areas where shootings commonly occur and to "hit the ground" when gunfire erupts. Popkin, *et al.*, Sweeping Out Drugs and Crime: Residents' Views of the Chicago Housing Authority's Public Housing Drug Elimination Program, 41 Crime & Delinquency 73, 75 (1995). Even more disturbing, in the first six months of 1999, 559 public housing authorities reported that 423 homicides, 1,610 rapes, 8,382 robberies, 20,766 aggravated assaults, 28,777 burglaries, 19,254 auto thefts, and 7,007 weapons violations occurred on housing authority grounds. In the Crossfire, *supra*, at 16-17.

Drug trafficking is another critical problem public housing communities must face on a daily basis. Nonresident drug buyers drive in at all hours of the day and night to make drug purchases, and nonresident drug sellers take over vacant units or illegally commandeer units of existing residents to "set up shop." Webster & Connors, *supra*, at 1. In the past, to evade physical harassment from gang members, some existing residents were compelled to allow gang members to hide their drugs in their apartments in exchange for a small monthly payment. S. Venkatesh, American Project, The Rise and Fall of a Modern Ghetto 146 (2000). Further, gangs generally overtook the public space in the communities to conduct drug deals, hold meetings, and survey the area for the police and rival gang members. *Id.*, at 177. Leaders in the gang communities would periodically stop residents, question where they had been, frisk them, and occasionally physically prevent them from entering the building. See *ibid.*

"In addition to serious crime and drug trafficking, residents must cope every day with darkened hallways, abandoned apartments, graffiti, trash, and street prostitution. Such visible disorder breeds fear, undermines social cohesion, and promotes crime and economic decay." Popkin, 41 Crime & Delinquency, at 75. Most people take for granted the sense of security that they feel in their own homes. Residents of public housing communities do not share that same sense of security. Instead, they live in terror on a regular basis. The constant threat of violence and the chronic fear of victimization also take a great toll on the mental health of public housing residents. Children are at high risk for psychological trauma and intellectual defects, and adults often suffer from severe depression, hopelessness, and a lack of motivation. *Ibid.*

Several federal, state, and local initiatives have been implemented in an effort to decrease crime rates in public housing communities. For example, the United States Department of Housing and Urban Development (HUD) has implemented several anti-crime and anti-violence measures in public housing communities over the past several years. This Court recently validated some of those efforts in *Department of Housing and Urban Development* v. *Rucker*, 535 U. S. 125, 136 (2002). Local leaders have also attempted to reduce crime by changing the physical layout of public housing communities. See U. S. Department of Housing and Urban Development, H. Cisneros, Defensible Space: Deterring Crime and Building Community 9-13 (February 1995). Because "[d]isputes are much more likely to end in a shooting or killing and to involve innocent bystanders," Popkin, 41 Crime & Delinquency, at 75, altering the physical design of the community makes it more difficult for nonresidents to cause such disputes on public housing grounds.

All these efforts illustrate that states have a compelling interest in preventing, controlling and combating crime in public housing developments. Law-abiding residents of these communities should not be forced to endure the anxiety and

sense of helplessness in the place that they call home. Behind the lofty, dry abstractions of First Amendment jurisprudence in this case lie the real lives and real deaths of real people. Any call for a court-created rule that would impair the housing authority's ability to protect the residents, such as the rule created by the Virginia Supreme Court in the present case, requires the most careful scrutiny.

II. "Overbreadth" should be applied only if applications of a statute are invalid for another reason, are substantial in scope, and are not cleanly severable.

In part III-B of its opinion, the Virginia Supreme Court addresses and accepts an argument "that the Housing Authority's trespass procedures are overly broad and, *therefore*, violate . . . the First Amendment . . . ." *Commonwealth* v. *Hicks*, 264 Va. 48, 54, 563 S. E. 2d 674, 678 (2002) (emphasis added). The court is confused. Overbreadth, as such, is not a ground for holding that a statute or other state action violates the First Amendment. Overbreadth is a basis for holding an enactment void in its entirety because a substantial portion of its operation violates First Amendment rights. In the typical case, the overbreadth doctrine is invoked to obtain standing for a challenger whose own action the state could legitimately proscribe. The statute is invalidated in its entirety, thus overturning the conviction of the person bringing the challenge, because "the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612 (1973); *Hill* v. *Colorado*, 530 U. S. 703, 731-732 (2000). Occasionally, a party who wishes to engage in both protected and unprotected speech may invoke the overbreadth doctrine to strike down an overly broad statute in both applications. See *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 484 (1989). Either way, there must *first* be substantial areas of application of the statute which are unconstitutional for some

other reason before the overbreadth doctrine can apply. Breadth as such is "not . . . a constitutional defect." *Hill*, *supra*, at 730.

The Virginia Supreme Court has confused the overbreadth doctrine with the vagueness doctrine. While both of these principles are invoked to attack imprecise laws, they are nonetheless distinct. See *Chicago* v. *Morales*, 527 U. S. 41, 52 (1989) (plurality opinion).

> "First, the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.' *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612-615 (1973). Second, even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests. *Kolender* v. *Lawson*, 461 U. S. 352, 358 (1983)." *Ibid.*

Unlike overbreadth, vagueness and excessive discretion in a licensing authority are, in themselves, constitutional defects. Many of the cases cited by the Virginia Supreme Court in its "overbreadth" analysis are actually from this distinct line of cases. See 264 Va., at 56-58, 563 S. E. 2d, at 679-680. In part III, *infra*, we will explain why this line of cases cannot be invoked without first deciding whether the streets in question remain a public forum. If they are not, then the trespass policy does not have any substantial applications which violate the First Amendment, and the overbreadth doctrine is inapplicable. However, if this Court should agree with the Court of Appeals majority on the public forum question, then it would be necessary to decide whether and to what extent to apply the overbreadth doctrine to invalidate the policy in otherwise constitutional areas of its application.

As this Court has stated many times, and as the Virginia Supreme Court recognized, "the overbreadth doctrine is 'strong medicine' and this doctrine should be employed 'sparingly and only as a last resort.' *Broadrick*, 413 U. S. at 613." *Id.*, at 56, 563 S. E. 2d, at 678. Indeed, several Justices of this Court have questioned whether the doctrine is even legitimate. See Brief for Criminal Justice Legal Foundation in *Virginia* v. *Black*, No. 01-1107, p. 5; see also *Morales*, 527 U. S., at 77 (Scalia, J., dissenting) ("declaring a statute to be void in all its applications [is] something we should not be doing in the first place"). Several limitations on the overbreadth doctrine have been stated explicitly in this Court's decisions, such as inapplicability to commercial speech, see *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 462-476, n. 20 (1978), less severe application to statutes which regulate conduct with an incidental effect on speech, as opposed to those that directly regulate expression, see *Broadrick*, 413 U. S., at 615, and the requirement that any overbreadth be substantial. See *ibid.* There is one more limitation which is especially pertinent to this case, however. Although not yet explicitly stated in an opinion of this Court, it is implicit in *United States* v. *Grace*, 461 U. S. 171 (1983).

Grace involved two federal statutes: 40 U. S. C. § 13k, which prohibits certain expressive activities on the Supreme Court's grounds, see 461 U. S., at 173, and n. 1, and 40 U. S. C. § 13p, which defines the grounds to include the sidewalks around the building. Justice Marshall, dissenting in part, would have held § 13k unconstitutional in its entirety. See 461 U. S., at 187. Anticipating *Fox*, *supra*, he would have applied the overbreadth doctrine even though the challenging party's own speech was constitutionally protected. See 461 U. S., at 187, n. 12. The majority, however, limited its holding to "the public sidewalks surrounding the building" and held only that "under the First Amendment the section is unconstitutional as applied to those sidewalks." *Id.*, at 183. An argument made by the dissent and not addressed by the majority is implicitly rejected by the majority. *Clemons* v. *Mississippi*, 494 U. S. 738, 747-748, n. 3 (1990). However, none of the limita-

tions on the overbreadth doctrine explicitly stated in this Court's opinions, and discussed above, applies. The speech in question is not commercial, the statute is directed squarely at expression, and the invalid applications are substantial. There must be another limitation on overbreadth to explain this result.

Grace's implicit limitation, *amicus* submits, goes back to the purpose of the overbreadth doctrine, as stated in *Broadrick*, *supra*. A statute which is overbroad on its face, with substantial invalid applications, ceases to have a chilling effect when it has been definitively struck down as invalidly applied, provided the line between the valid and the invalid applications is reasonably clear. After this Court's decision in *Grace*, demonstrators knew they could express themselves on the sidewalk adjacent to the street. The continuing valid applications of the statute to prohibit, *e.g.*, parading inside the building during oral argument, present no threat to genuine First Amendment liberty.

As we explain in part III, *infra*, the RRHA's trespass policy is perfectly valid as applied to nonpublic forum property. If Whitcomb Court is found to include both public and nonpublic areas, the policy should remain in force for the nonpublic forum areas, just as the statute did in *Grace*.

III. The "unfettered discretion" cases have no application to government-owned property which is not a public forum.

The Virginia Supreme Court's opinion in the present case states that it did not need to resolve whether the streets in question remain a public forum in order to decide the "unfettered discretion" question. See *Commonwealth* v. *Hicks*, 264 Va. 48, 60, 563 S. E. 2d 674, 681 (2002). This statement is puzzling, to put it mildly. This Court's landmark precedent on forum analysis makes crystal clear that the governing rules are quite different for public and nonpublic forums.

> "Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property." *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 49 (1983).

This Court has recognized the distinction several times since *Perry*. "The government can restrict access to a nonpublic forum 'as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.' " *Arkansas Ed. Television Comm'n* v. *Forbes*, 523 U. S. 666, 677-678 (1998) (quoting *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 800 (1985)); see also *United States* v. *Albertini*, 472 U. S. 675, 686 (1985) (rejecting "standardless discretion" claim; Hickam Air Force Base not a public forum).

As *Forbes* illustrates, the government's ability to exercise discretion in access goes to the very heart of the distinction between nonpublic forums and public forums, whether traditional or designated. In that case, the question was whether a candidate debate on public television "was a designated public forum or a nonpublic forum." 523 U. S., at 678. The difference is that the nonpublic forum allows the government to make "individual non-ministerial judgments as to . . . [who] will participate." *Id.*, at 680 (citing *Cornelius*, *supra*). These "non-ministerial judgments" that are essential to the operation of a nonpublic forum are precisely what the "excessive discretion" cases forbid in a public forum. In *Forsyth County* v. *Nationalist Movement*, 505 U. S. 123, 133 (1992), even the discretion to set a fee for a permit was deemed intolerable. The difference between *Forbes*, where a government actor had broad discretion to completely exclude a speaker, and *Forsyth County*, where a government actor could not even be allowed discretion to set a fee, is in the type of forum. *Forbes* involved a nonpublic

forum, while *Forsyth County* involved "public speaking, parades, or assemblies in 'the archetype of a traditional public forum.' " 505 U. S., at 130 (quoting *Frisby* v. *Schultz*, 487 U. S. 474, 480 (1988)).

When the challenging party invokes the "excessive discretion" cases, and the government disputes the public forum status of the property, that status must be resolved before those cases can be applied. If the government property is not a public forum, either traditional or designated, the fact that responsible officials exercise discretion regarding access to the property is not a constitutional defect. The discretion is not unlimited. It must be exercised reasonably and not for the purpose of suppressing a viewpoint merely because the official disagrees with it. See *International Soc. for Krishna Consciousness, Inc.* v. *Lee*, 505 U. S. 672, 687 (1992) (opinion of O'Connor, J.). However, the law that confers the discretion is valid, and a facial attack on it fails.

CONCLUSION

To the extent it forbids the exercise of discretion regarding nonresidents' access to housing project property which is not a public forum, the decision of the Virginia Supreme Court should be reversed.

February, 2003

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 7 2003
OFFICE OF THE CLERK

No. 02-371

In the
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF VIRGINIA,
Petitioner,

v.

KEVIN LAMONT HICKS,
Respondent.

BRIEF OF THE STATES OF ALABAMA, ALASKA, DELAWARE, FLORIDA, HAWAII, INDIANA, MISSISSIPPI, MISSOURI, OHIO, OKLAHOMA, OREGON, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, AND THE COMMONWEALTH OF PUERTO RICO IN SUPPORT OF PETITIONER,

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QUESTION PRESENTED

1. May a criminal defendant escape conviction by invoking the overbreadth doctrine even though (i) his own offense did not involve any expressive conduct, and (ii) his conduct was not proscribed by that portion of the government policy he challenges as overbroad?

2. In this context, does the Constitution recognize a distinction between actions taken by a governmental unit as landlord and actions taken by a governmental unit as sovereign?

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INTEREST OF AMICUS CURIAE

Attorneys general – and thus the chief law enforcement officers – of their respective states and commonwealths, submit this brief on behalf of their states or commonwealths as amici curiae. Under varying schemes, the Attorneys General are called upon to enforce laws that protect the welfare and safety of their states' citizens. They are also responsible for defending laws, policies, and actions against constitutional attacks. The Virginia Supreme Court has construed the First Amendment in a way that implicates both of these missions.

The Virginia Supreme Court's expansive interpretation of the First Amendment overbreadth doctrine threatens to make susceptible to overbreadth challenges public safety and other laws that were heretofore outside the doctrine's reach. Schools, libraries, and courthouses have strict restrictions on unauthorized persons entering all or portions of their property. Trespass laws and polices are often the first law enforcement tools that keep potentially dangerous persons from entering, and thus protect adults and children who reside on, work on, attend school on, or visit government property. The Virginia Supreme Court interpreted the overbreadth doctrine in a way that could lead to declarations that many trespass policies are invalid and thereby make government-owned property less safe for residents and for the public.

The amici seek to defend the continued ability of government officials to protect public safety through the enforcement of criminal laws, including laws against trespassing on government property.

SUMMARY OF ARGUMENT

The overbreadth doctrine as interpreted by this Court is narrow. It allows a court to invalidate a law or policy if its mere existence, as opposed to its application, deters or "chills" potential speakers, regardless of whether the statute has been unconstitutionally applied to the defendant or litigant. Moreover, even when there is a chilling effect of a law or policy directed toward conduct, it can be invalidated only when the interest in preventing chilling of protected speech outweighs the legitimate sweep of that law.

Though narrow, the doctrine is an extraordinary departure from the traditional rules of standing. It allows a person to challenge a statute based on its potential application to persons not before the court. Therefore, it is only applied sparingly and as a last resort.

Here, the Virginia Supreme Court should not have invoked the overbreadth doctrine to invalidate the policies of the Housing Authority[1] barring from a housing development non-residents, non-employees, and persons who "cannot demonstrate a legitimate business or social purpose for being on the premises."[2]

The policy at issue is part of the enforcement mechanism for an ordinary criminal law – a trespass statute – that only incidentally affects speech. And the person invoking the overbreadth doctrine was not even engaging in First Amendment expressive activity. When the main focus of the law or policy is not the restriction of speech, but the protection of the public, and the person subject to the charge at issue is not engaging in expressive activity, the likelihood of chilling from the existence of the law is too remote to justify its invalidation. Here, the Virginia Supreme Court invoked the overbreadth doctrine with neither a finding nor evidence that the Housing Authority policy had a chilling effect on speech.

Even if there had been some evidence that the existence of the Housing Authority policy deterred someone from engaging in protected speech, the interest in preventing the chilling would be outweighed by the government interest in public safety. Trespass laws serve a critical function. When public housing developments [illegible] open-air drug markets, when courthouses are threatened with bioterrorism attacks, and when schools are subjected to gunfire, trespass laws are often the first

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[1] The Richmond Redevelopment and Housing Authority is referred to herein as the Housing Authority.

[2] *Virginia v. Hicks*, 563 S.E.2d 674, 676 (Va. 2002).

line of defense. The essential safety role those laws play should not be subordinated to a mere conjecture that they may be applied to prevent someone from engaging in protected speech.

The holding of the Virginia Supreme Court ignores the safety interest of those using government property. The court's holding does not deprive those who live on private property of the benefit of trespass laws. But it takes that protection away from the poor who live in public housing – and not because the trespass laws and policies have affected speech, but merely because they might. It also takes trespass protection away from others who use the government's real estate, whether they be library patrons, school and college students, or even visitors to this Court.

This Court should reiterate the narrow scope of the overbreadth doctrine, bringing its focus back to its traditional and appropriate limits so as to protect persons on government property.

ARGUMENT

I. As an exception to the general rules of standing, the overbreadth doctrine should be applied sparingly.

Attorneys general and other government officials frequently hear the cry that a statute, regulation, or policy is "overbroad." The Virginia Supreme Court, losing sight of the core principles of the overbreadth doctrine as set forth by this Court, has expanded the doctrine to unprecedented lengths.

The overbreadth doctrine is an exception to the traditional rule governing constitutional adjudication, *i.e.*, that a person to whom a statute may constitutionally be applied cannot challenge the statute on the ground that it could be unconsti-

tutionally applied to others.[3] That traditional rule exists because "courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws."[4] Nevertheless, this Court has concluded that "the First Amendment needs breathing space," and established overbreadth as an exception to the general rule. That exception, under which litigants are permitted to challenge a statute on its face even though their own rights of free expression have not been violated, is based on a "judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."[5] This potential for self-censorship is sometimes referred to as the "chilling" effect of such a law.[6]

Holding that a law is facially overbroad in violation of the First Amendment brings two consequences. First, if the challenge occurs in a criminal case, the defendant goes free.[7] Second, any enforcement of that law is forbidden, at least until the law is changed or is given a limiting construction that "remove[s] the seeming threat or deterrence to constitutionally

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[3] *New York v. Ferber*, 458 U.S. 747, 767 (1982); *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). The doctrine is occasionally applied, as here. to policies rather than a statute, regulation, or ordinance. For simplicity, we refer generically to "laws."

[4] *Broadrick*, 413 U.S. at 610-11.

[5] *Id.* at 612.

[6] *Ferber*, 458 U.S. at 772, n.27; *Broadrick*, 413 U.S. at 618.

[7] *Gooding v. Wilson*, 405 U.S. 518 (1972).

protected expression."[8] Because these consequences are so severe, this Court calls the application of the overbreadth doctrine "strong medicine" that should be "employed by the Court sparingly and only as a last resort."[9] The overbreadth doctrine is to be applied only when "facial invalidation of a statute is truly warranted" and "carefully tied to the circumstances."[10]

The Virginia Supreme Court failed to explain why the extraordinary remedy of invalidating a policy, particularly one primarily directed to protecting public safety, was "truly warranted." The Virginia court's blurry vision obscures the principles underlying the overbreadth doctrine, letting courts stray and jeopardizing safety in public housing, schools, and courthouses.

II. The overbreadth doctrine should apply only to laws that are directed to expressive activities and that are capable of chilling protected speech, and to defendants who engage in expressive activities.

This Court has warned that the overbreadth doctrine is "strong medicine."[11] But the way the doctrine was applied by the Virginia Supreme Court, it was more than strong medicine. It was an amputation.

The Virginia Supreme Court did not invalidate that

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[8] *Broadrick*, 413 U.S. at 613.

[9] *Id.* at 613.

[10] *Ferber*, 458 U.S. at 769.

[11] *Broadrick*, 413 U.S. at 613.

state's trespass statute.[12] Instead, it invalidated the Housing Authority's trespass *policy* as being facially overbroad. The Virginia court called the Housing Authority policy partially written and partially unwritten. The written portion makes the trespass statute applicable to any non-resident or non-employee or any other person who "cannot demonstrate a legitimate business or social purpose for being on the premises."[13] The court found the "unwritten" portion in the testimony of a manager of the Housing Authority regarding hypothetical situations.[14] As the Commonwealth of Virginia points out in its brief on the merits, that testimony may be more accurately described as reflecting an "unwritten addendum" to a written policy. Moreover, the Virginia court resorted to use of an oxymoron when it stated that an "unwritten" policy is "facially" overbroad.[15]

The Virginia Supreme Court's ruling is disturbing. It in effect repeals Virginia's trespass law, but only in selected areas: Housing Authority properties and government property to which trespass policies of similar specificity apply. Those trespass laws and policies provide obvious public safety benefits. They afford privacy and security to persons who live, work, or visit the areas that they cover. These benefits remain in place for most Virginia residents. But persons who live in public housing, and presumably for anyone on government property covered by an unauthorized-persons trespass policy

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[12] The trespass law under which defendant Hicks was convicted is Va. Code § 18.2-119.

[13] *Hicks*, 563 S.E.2d at 676.

[14] 563 S.E.2d at 680.

[15] *Id.*

similar to that of the Housing Authority, have lost the protection of the Virginia trespass law.

Respondent obtained that result even though the Virginia court did not jump all the hurdles prerequisite to an overbreadth finding. A court considering an overbreadth challenge must determine whether the party making the challenge has standing to do so as well as whether substantively the doctrine should apply in the particular factual situation. The question on which this Court granted certiorari deals with the standing issue, *i.e.*, can defendant Hicks bring an overbreadth challenge here? The Commonwealth of Virginia has briefed that issue thoroughly and its analysis will not be repeated here. But in addition to the important concerns regarding standing, amici are also concerned with the deficiencies in the Virginia court's substantive analysis. By applying the overbreadth doctrine without a finding or evidence that the contested trespass policy has a chilling effect, or even an explanation of why the interest in public safety is outweighed by the interest in deterring a chilling effect, the Virginia court has created a very troubling precedent – one with significant adverse implications.

Courts and commentators have noted that the overbreadth doctrine should not be applied in a fashion that threatens public safety, *i.e.*, that it should not be applied to ordinary criminal laws, and to trespass laws in particular. For instance, this Court in *Broadrick v. Oklahoma* recognized a distinction between applying the overbreadth doctrine to laws that primarily regulate speech and applying it to laws that do so only indirectly or incidentally: "[O]verbreadth claims, if entertained at all, have been curtailed when invoked against ordinary criminal laws that are sought to be applied to protected conduct."[16] And in *New York v. Ferber*, this Court stated: "[T]he

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[16] *Broadrick*, 413 U.S. at 613.

Court's practice when confronted with ordinary criminal law that are sought to be applied against protected conduct is not to invalidate the law in toto, but rather to reverse the particular conviction."[17] This Court further observed in *Broadrick* that when it had overturned breach-of-peace convictions in the past, it did so on as-applied grounds, and considered references in those opinions to facial overbreadth to be dicta.[18]

Additionally, this Court has stated that the function of the overbreadth doctrine "attenuates" as the behavior moves from "pure speech" toward conduct (even if expressive) that "falls within the scope of otherwise valid criminal laws that reflect legitimate state interests."[19] Even if the conduct-directed law does deter speech, "there comes a point where that effect – at best a prediction – cannot, with confidence, justify invalidating a statute on its face."[20] When conduct, and not merely speech is involved, the overbreadth must be both real and substantial, when compared to the statute's "plainly legitimate sweep."[21] Thus, while chilling is a prerequisite to an overbreadth invalidation, it is not sufficient. The nature and degree of the chilling must be weighed against the legitimate sweep of the law.

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[17] 458 U.S. at 773.

[18] *Broadrick*, 413 U.S. at 614-15, *distinguishing Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Garner v. Louisiana*, 368 U.S. 157 (1961); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Teamsters Union v. Vogt, Inc.*, 354 U.S. 284 (1957).

[19] *Broadrick*, 413 U.S. at 615.

[20] *Id.*

[21] *Id.*; *Hill v. Colorado*, 530 U.S. 703, 731-32 (2000).

Commentators have endorsed these principles expressly as to trespass laws, even in advocating an expansion of the overbreadth doctrine, because "courts should hesitate to find substantial overbreadth" to a statute "that aims to promote state interests unrelated to the content of expression and that infringes First Amendment interests only incidentally."[22] That is because

> when the government has not targeted expressive activity, courts cannot reasonably require a regulation to achieve the degree of precision that is warranted when a law centrally implicates speech. Only a small likelihood will typically exist that the statute reflects a covert effort to discriminate on the basis of content. Moreover, the government's valid interest in being able to enforce the statute will frequently be important.[23]

An often-cited Harvard Law Review Note presents a similar analysis. The author observes that overbreadth scrutiny applies when the "primary conduct ... at issue must to a substantial extent be the kind of expressive and associational behavior which at least has a colorable claim to the protection of the [first] amendment."[24]

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[22] Richard H. Fallon, *Making Sense of Overbreadth*, 100 YALE L.J. 853, 896 (1991). *See also id.* at 908 (advocating greater use of overbreadth doctrine).

[23] *Id.* at 897.

[24] Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 860 (1970).

The Virginia Supreme Court took the overbreadth doctrine to a new level when it applied that doctrine to an ordinary criminal law, and to conduct that was not expressive conduct protected by the First Amendment.[25] The likelihood of a chilling effect in such circumstances is remote. Here, the Virginia court invalidated the Housing Authority policy without concluding that the policy deterred or was likely to deter anyone from engaging in protected expressive activity. There was no evidence that anyone interested in engaging in protected expressive activity even knew of the Housing Authority policy. An unknown policy does not deter conduct.

Using the overbreadth doctrine as anything other than "a last resort"[26] to attack laws that really do deter speech threatens the fair and proper use of the criminal law. Courts considering the doctrine must recognize that it is not applied broadly; here, as in many other instances where a criminal defendant wants to invoke overbreadth to avoid prosecution, we are only at "a point where [the chilling] effect – at best a prediction – cannot, with confidence, justify invalidating a statute on its face."[27] It must be an extraordinary circumstance where a defendant whose actions have absolutely nothing to do with speech is able to avoid prosecution because a statute might, at some other time

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[25] In the instant case, defendant Hicks merely claimed to be delivering diapers to his son when he was charged with a trespass violation. *Hicks*, 563 S.E.2d at 677, 684. Hicks had previously been convicted of damaging property at the Housing Authority. *Hicks v. Virginia*, 548 S.E.2d 249, 252 (Va. App. banc 2001), *aff'd in part and vacated in part*, 563 S.E.2d 674 (Va. 2002).

[26] *Broadrick*, 413 U.S. at 613.

[27] *Id.* at 613, 615.

in some other, so far entirely hypothetical circumstance, be invoked to inhibit speech.

III. By establishing a low standard for invalidation of criminal trespass laws, the Virginia Supreme Court's ruling seriously threatens public safety.

Even in cases in which some chilling exists, courts must balance the chilling effect of the law or policy against its "plainly legitimate sweep."[28] Here, the public safety interests served by the Housing Authority's trespass policy were substantial: the undisputed record showed that the primary goal was to "eradicate illegal drug activity in ... an 'open-air drug market'" in the housing complex.[29]

Rendering criminal trespass laws useless in protecting government property creates great danger to public safety. In a society where we see guns at schools and bombs and anthrax at courthouses, trespass laws are a major tool for law enforcement officials. These laws are not typically mere "keep off the grass" regulations enacted to make property maintenance easier. Invalidating them poses a much greater threat than does invalidating speech-restriction laws or expressive-conduct-restriction laws. It is not hard to appreciate the difference between the effect on public safety of invalidating a law barring outsiders from a housing complex invaded by an open-air drug market and the effect of invalidating a law requiring a permit to place newspaper racks on a public sidewalk.[30] In considering

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[28] *Broadrick*, 413 U.S. at 615; *Hill*, 530 U.S. at 731-32.

[29] *Hicks*, 563 S.E.2d at 676.

[30] Compare this case to *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988)(invalidating

whether to invalidate laws or policies, courts should give great weight to the benefits of the "plainly legitimate sweep" of trespass laws or other ordinary criminal laws.

The Housing Authority policies barring persons without a "legitimate business or social purpose for being on the premises"[31] are similar to policies for many government owned places. A typical example is the trespass policy for the United States Supreme Court Building. This Court's regulations give the Marshal of the Supreme Court nearly complete discretion to bar the general public from all or any portion of the Supreme Court Building or grounds, and to determine who is or is not a member of the "general public":

> In order to protect the Supreme Court Building and grounds, to protect the persons and property therein, or to maintain suitable order and decorum, the Marshal of the Supreme Court, pursuant to the responsibilities outlined in 40 U.S.C. § 13*l*, may, at any time, declare the Supreme Court Building and grounds, or any portion thereof, closed to the general public. Any person who, having been informed of the closure of the building or grounds or portion of the building or grounds, enters the closed area without the authorization of the Marshal or refuses to leave the closed area after being requested to do so shall be subject to arrest and

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ordinance requiring permits for placement of newspaper racks on public property, with permits issued at the discretion of the mayor).

[31] *Id.* at 676.

subject to penalties set forth in 40 U.S.C. § 13m.[32]

Appropriately, this regulation is no more definite than the Housing Authority regulation barring access to any person who is not a resident, is not an employee, or "cannot demonstrate a legitimate business or social purpose for being on the premises."[33] In fact, the Housing Authority regulation is even more definite in its phrasing than the Supreme Court's bar on the "general public" accessing certain areas. The regulation on its face contains no standards for the exercise of the Marshal's discretion that would prevent the Marshal from engaging in viewpoint discrimination in defining "general public" or in deciding who can access which areas.

And there is nothing wrong with that, except in the eyes of the Virginia Supreme Court. In that court's view, standardless discretion alone leads to an invalidation of a trespass-type policy. Under the Virginia court's decision, the Supreme Court Building trespass regulation would be invalid.

The implications of the Virginia Supreme Court's analysis would be staggering for the Supreme Court Building. A person planning terrorist activity might trespass onto restricted parts of the building to learn about the floor plans, access, and other details of the non-public portions of the building. If he is then arrested, the Virginia court's analysis would allow him to argue that the broad discretion given to the Marshal makes him immune from conviction. Moreover, an overbreadth

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[32] Regulation Two, approved October 4, 1994, provided to counsel Erwin O. Switzer by the Supreme Court of the United States Police via facsimile on February 14, 2003.

[33] *Hicks*, 563 S.E.2d at 676.

ruling would leave this Court entirely without trespass regulations, at least until it could come up with something that meets the Virginia court's standard.

We do not use this example to criticize this Court's policies in any way. The point is the opposite. This Court's security policies are appropriate and reasonable; the Virginia Supreme Court's analysis and its necessary results are not. The nation would be severely endangered if the trespass policies of the Supreme Court Building were easily invalidated. Depriving the residents of a single housing development of the protection of trespass policies would not have the same broad impact. But those people also deserve protection.

We cannot quantify the scope of the problem that affirming the Virginia court's holding would create. Formal policies like this Court's Regulation Two are not catalogued. But they certainly exist in a variety of other contexts, protecting those who use government property. Three generic examples are libraries, elementary and secondary schools, and colleges.

Public Libraries: Libraries pride themselves on providing opportunities for children and adults to study and learn in a quiet, safe environment. To achieve those goals, libraries will revoke library privileges and ban persons who disrupt those activities, whether by fighting, stealing, drug-activity, or other inappropriate or offensive behavior. The trespass laws are used to keep such persons out if they try to return.

Consider the case of a young adult who seeks out an enemy gang member at a library and begins an assault. The library revokes the assailant's privileges. The assailant returns and is arrested for trespassing. Under the Virginia Supreme Court analysis, the assailant could avoid a conviction if the library used general terms (such as "inappropriate behavior") or

if the branch manager thought she had wide discretion to decide whose privileges to revoke. This would be the case even though there had never been a revocation on unconstitutional grounds, or perhaps not even a revocation at all. Moreover, not only would the assailant be free to return, but the library would be unable to exclude anyone from the library whose privileges were revoked.

Elementary and high schools: Schools face many potential dangers from outsiders. Drug dealers or pedophiles may lurk near or on school grounds. Children may be subjected to kidnaping from bitter, non-custodial parents. Students expelled or suspended for bringing weapons to school may want to re-enter school property to settle a score. But schools also benefit from the presence of outsiders. Schools readily invite many, including include police officers, judges, and artists, to speak to classes or assemblies or otherwise interact with students. And they invite parents and other volunteers, whose contributions are often critical to the schools' success.

The policies of many schools contain general descriptions of who is authorized to be on the school premises. Given the wide variety of possible non-students and non-employees who may visit a school, it is quite reasonable to use a phrase like "legitimate business or social purpose" to describe who may enter school property. But according to the Virginia Supreme Court, if a school uses such a description to describe the classes of persons who are not deemed trespassers, the trespassers could go unpunished, and the school would find itself unable to enforce the trespass policy at all.

College campuses: While state-run college campuses often make portions of their properties available to the public, there are many portions of the campus that are restricted to varying degrees. These include laboratories, dormitories, and administrative offices.

The Virginia Supreme Court's holding would be particularly problematic on college campuses. For instance, a policy that barred from a women's dormitory non-residents and persons without a legitimate social or business purpose for being there would seem to be invalid under the Virginia court's test. This would be particularly likely if the policy did not expressly preclude the possibility of viewpoint discrimination, such as permitting the lobby to be used for pep rallies to support the football team but not for demonstrations to discontinue the football program. If there is a constitutional problem with that distinction, the problem should not provide a defense to a trespasser who is stalking a resident. And that perceived defect should not be a basis for invalidating the trespass policies altogether, making it impossible to arrest anyone in the dormitory for trespassing. Facial invalidation is an unwarranted remedy.

It is particularly ironic that the Virginia decision would reduce the protection granted by trespass laws to those present on college campuses. "The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas'...." *Healy v. James*, 408 U.S. 169, 180-81 (1972), *citing Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 249-250 (1957) (Warren, C.J., plurality opinion), 262 (Frankfurter, J., concurring in result). But it will not remain an effective marketplace if trespass laws are eliminated as a method of protecting the safety of those who live and speak on campus. Indeed this Court has recognized that first amendment rights on campus are for "persons entitled to be there," *Widmar v. Vincent*, 454 U.S. 263, 269 (1981), a statement that necessarily implies that others may be excluded. Again, trespass laws and policies are an essential tool in that exclusion.

The threat posed by interlopers seems obvious – and not just in libraries, in schools, on college campuses, and in courthouses. Without being graphic, it is easy to imagine real and substantial harm that would occur if government trespass policies were broadly invalidated, as the Virginia Supreme Court's rule would require. The infestation of drugs and other crimes in the Housing Authority development is obviously of great import. When balancing the threat of chilling against the public safety concerns as advanced by ordinary criminal laws that only incidentally affect speech, the public safety concern will typically, if not always, outweigh the concern with chilling.

Indeed, our research revealed no pre-*Hicks* cases in which such significant safety concerns were outweighed by the interests of combating a chilling. In the rare case invalidating laws pursuant to the overbreadth doctrine, the safety concerns served by the law at issue are typically less significant than are those served by ordinary criminal laws. For example, this Court has invalidated laws under the overbreadth doctrine only a few times in the last thirty years. And in each instance, the statute at issue had obvious free speech implications, regulating such things as the placement of newspaper racks on public

sidewalks,[34] parade permits,[35] or the use of foul language.[36] None of those laws implicated serious public safety concerns.

The Virginia Supreme Court's analysis, if adopted by this Court, would threaten public safety interests in many contexts. This Court should not allow the overbreadth doctrine to be expanded to undercut trespass or other ordinary criminal laws.

IV. Those who will suffer most from the invalidation of trespass laws or other public safety laws, persons who are among the most vulnerable in our society, should not be burdened with more crime.

Under the Virginia Supreme Court's standards, law enforcement tools would be at their weakest where the public most likely would assume that the vigilance to protect public safety is greatest. The persons most affected will be those who live in government-owned public housing. Persons who can

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[34] *City of Lakewood*, 486 U.S. 750 (1988)(invalidating ordinance requiring permits for placement of newspaper racks on public property, with permits issued at the discretion of the mayor).

[35] *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992)(invalidating parade permit ordinance in which the permit fee could be varied in the discretion of the government permitting official).

[36] *Gooding v. Wilson*, 405 U.S. 518, 518, 527 (1972)(invalidating ordinance against use of "opprobrious words or abusive language .... tending to cause a breach of the peace," construed to bar any "words offensive to some who hear them").

afford to live on private property – in luxury condominiums or apartment complexes – lose not trespass protection.

If this Court approves of the low threshold set by the Virginia Supreme Court, more and more trespass policies will be invalidated. And more and more criminal trespassers will go free. The drug-dealer at the public housing complex who seeks to ensnare new victims cannot be tossed out or arrested unless caught in the act. The plotting burglar can case a residence with impunity. The potential assailant can sit and wait indefinitely for a former girlfriend to emerge from her residence.

The Virginia Supreme Court's concern with freedom of speech does not justify the adverse impacts of its holding. Those who live in an "open-air drug market" will find little solace in a court's efforts to protect them the "possible inhibitory effects" on the airing of grievances left to fester.[37] Particularly when the societal benefit of judicial repeal of policies is marginal, the courts should not leave the poorest and most vulnerable members of society to shoulder another burden.

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[37] *Broadrick*, 413 U.S. at 612.

CONCLUSION

The First Amendment overbreadth doctrine should not be expanded. Before allowing a defendant to invoke the rights of non-litigants, courts should give great weight to the legitimate public interests at stake. Failure to do so imposes unnecessary risks on the poor in public housing and other persons who live, work, or visit government property.

Respectfully submitted,

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March 5, 2003

No. 02-371

(10)

SUPREME COURT
FILED
MAR 7 - '03
OFFICE OF THE CLERK

In The Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

KEVIN LAMONT HICKS,

Appellee.

ON GRANT OF A WRIT OF *CERTIORARI* TO THE SUPREME COURT OF VIRGINIA

BRIEF OF *AMICI CURIAE* CITY OF RICHMOND AND RICHMOND REDEVELOPMENT AND HOUSING AUTHORITY IN SUPPORT OF APPELLANT'S BRIEF ON THE MERITS

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38 pp

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STATEMENT OF INTEREST OF *AMICI*[1]

The City of Richmond ("City" or "Richmond") is the capital and fourth largest city in the Commonwealth of Virginia. Through the ongoing efforts of City Council and various departments and agencies, the City of Richmond works to provide for, and improve, the security and well-being of the almost 200,000 citizens living within its boundaries. Pursuant to § 2.04 of its Charter, the City of Richmond has the "power to adopt ordinances . . . for the preservation of the safety, health, peace, good order . . . [and] welfare of its inhabitants . . . ." Section 2.03(a) of this Charter specifically authorizes it to close public streets, and Va. Code Ann. § 15.2-2006 confers the additional ability for the City to alter or vacate public rights-of-way either upon the motion of City Council or the application of a person.

Created by Richmond City Council in 1940, Richmond Redevelopment and Housing Authority ("RRHA") is the largest public housing authority in the Commonwealth of Virginia. Its mission includes the provision of quality and affordable housing to low- and moderate-income tenants, the promotion of their self-sufficiency and economic betterment, the revitalization and elimination of blighted areas within the City, and the prudent oversight of growth and conservation programs designed to improve the overall quality of life in urban neighborhoods and environments.

Through an array of programs and in collaboration with the City of Richmond, the Commonwealth of Virginia, and other interested parties, RRHA actively seeks on a daily

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[1] In accordance with Supreme Court Rule 37.6, *amici* hereby represent that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici* has made any monetary contribution to the preparation or submission of this brief. The parties' written consents are accompanying this brief pursuant to Rule 37.3(a).

basis to prevent violence and criminal activity in its various communities, promote safe and secure dwellings and living conditions, and provide opportunities in which law-abiding tenants can empower themselves and realize their economic and educational potentials, as well as their dreams of home ownership.

RRHA's housing operations cover sixteen housing developments for low-income families, nine developments for low-income elderly and the disabled, and scattered-site single-family homes and special housing units throughout the City of Richmond. Through its approximately 350 employees, RRHA manages over 4,000 public housing units in the City and provides subsidized housing in over 2,700 of these units. In all, RRHA serves approximately 12,000 public housing residents, and its programs directly serve and benefit over 33,000 Richmonders.

RRHA, in conjunction with City officials, formulated the trespass-barment policy for its communities as part of an ongoing front-line effort to rid public housing neighborhoods of criminal activity (often violent and drug-related) that is all too frequently committed by non-tenants and non-residents with no lawful purpose for being present on RRHA property.

Richmond City Ordinance No. 97-181-197, which closed and privatized certain interior streets in the Whitcomb Court housing development so that the City's right and title in these streets could later be deeded over to RRHA, was adopted by Richmond City Council under the authority granted by City Charter §§ 2.03 and 2.04, and Va. Code Ann. § 15.2-2006. This street privatization effort directly led to the implementation of the RRHA trespass-barment policy that was erroneously stricken below as being overbroad and violative of the First Amendment of the Constitution of the United States.

INTRODUCTION

A deadly mix of drugs and guns on or near several of RRHA's public housing communities mandated that RRHA and the City act to protect RRHA's tenants. The overwhelming majority of tenants in these neighborhoods are African-American. Most households are single-parent and headed by women. The presence of crime, often violent crime brought to their streets, sidewalks, and playgrounds from without, denies those tenants the opportunity to live in safe communities, and to raise their families free from fear of violence. Most do not have the capability to relocate to safer neighborhoods. These law-abiding citizens should not be forced to tolerate such conditions. While such problems with violent crime in public housing are not, and have not been, unique to the City of Richmond. Department of Housing and Urban Dev. v. Rucker, 122 S. Ct. 1230 (2002), RRHA and the City could not stand by idly.

In response, RRHA devised, and Richmond City Council, after review by other City departments, approved, a series of measures that resulted in the privatization of streets and sidewalks in Whitcomb Court (and eventually in other RRHA communities).[2] This allowed RRHA, with the approval and support of the City Police Department, to implement a trespass-barment policy that reduced crime in Whitcomb Court[3] until it was stricken as overbroad by five of the seven justices of the Supreme Court of Virginia. The events leading to this erroneous decision are as follows:

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[2] These concerns cross racial lines. RRHA is governed by seven commissioners. Currently, five, as well as its Executive Director, are African-American; two are white. Richmond City Council is composed of nine members. Currently, six are African-American, as are the City Manager and the City's Chief of Police; three council members are white.

[3] Whitcomb Court is the only RRHA neighborhood specifically at issue in this appeal.

STATEMENT OF ADDITIONAL RELEVANT FACTS

The Compelling Need to Reduce Crime in Richmond

During the twelve years preceding street privatization in Whitcomb Court under City Ordinance No. 97-181-197, and the resulting launch of RRHA's trespass-barment policy, the City of Richmond was known as "the murder capital of Virginia"[4] and "one of the nation's murder capitals."[5]

The availability of illegal drugs was a key cause of Richmond's "national Murder City image."[6] In 1986, "crack cocaine came to town"[7] "selling for as little as $5 a 'rock,'"[8] and homicides increased dramatically.[9] Between 1986 and 1997, Richmond's homicide rate per 100,000 people ranked perennially among the top ten in the nation, fluctuating between seventh place (1986)[10] and second place (1994,

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[4] Gary Robertson, For the Media: 'A Feeding Frenzy'; Reaction Soon Overshadowed Event, *Richmond Times-Dispatch*, June 21, 1998, at A-1.
[5] Carrie Johnson, Crime That's Often Lost; No Easy Definitions or Answers to Rape, *Richmond Times-Dispatch*, Aug. 24, 1998, at A-1.
[6] Mark Holmberg, Richmond on Top of Crime; 'It's a Phenomenal Turnaround,' Renaissance Executive Director Says, *Richmond Times-Dispatch*, Jan. 3, 2000, at B-1.
[7] Mark Holmberg & Jim Mason, 10 Slayings in City in First 15 Days of '97 a Bloody Beginning, *Richmond Times-Dispatch*, Jan. 16, 1997, at B1.
[8] Mark Holmberg, He Escapes Crack's Hook and Comes Alive, *Richmond Times-Dispatch*, Oct. 15, 2000, at S151.
[9] Crack cocaine is still a major cause of death in Richmond. Paige Akin, 2002 Homicide Rate Attributed to Drugs; More Than a Third Came at Year's End, *Richmond Times-Dispatch*, Feb. 13, 2003, at B1.
[10] Michael Martz, City Man's Death Sets Homicide Record, *Richmond News Leader*, Dec. 30, 1989, at 1.

1997).[11] Its rate was consistently the highest in the Commonwealth over this same period.[12]

Commentators and City residents have stated various rationales for Richmond's ranking, the most common being the increased prevalence and mix of drugs and guns on City streets.[13] One reporter observed that "locals tend to blame it mostly on drug-related killings, especially in and around the housing projects."[14] This perception was supported by empirical evidence. During January-June 1990, only 6% of Richmonders lived in public housing, but 41% of homicides committed in the City occurred there.[15] Similarly, during January-April 1990, a disproportionate number of robberies (15%), rapes (17%), and aggravated assaults (24%) occurred in public housing.[16]

Richmond sought and received federal assistance with its law enforcement efforts. For example, HUD named the City in 1990 as one of twenty that would receive funds for a program designed to "seize the public housing leases of alleged drug dealers or people believed involved in the drug trade."[17] In 1994, HUD awarded RRHA a $1.1 million grant

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[11] Gordon Hickey, FBI Numbers Confirm Trend; Richmond No. 2 in '94 Murder Rate, *Richmond Times-Dispatch*, May 22, 1995, at A1; Gordon Hickey, Violent Crimes Drop in City; Clearance Rate Up; Police Work Praised, *Richmond Times-Dispatch*, Apr. 28, 1998, at A-1.
[12] Gordon Hickey, Gunshot Treatment Costs High, *Richmond Times-Dispatch*, Mar. 14, 1999, at A-6.
[13] Brian Kelley, City May Set Two Homicide Records, *Richmond Times-Dispatch*, Oct. 22, 1990, at A1.
[14] Ray McAllister, Using the Police Ball to Make a Statement, *Richmond Times-Dispatch*, Oct. 8, 1993, at B1.
[15] Gordon Hickey, Homicides Found to Occur Mostly in Housing Projects, *Richmond News Leader*, Aug. 11, 1990, at 17.
[16] Gordon Hickey, Violent Crime Rate Is Confirmed Higher in City Housing Projects, *Richmond News Leader*, May 21, 1990, at 1.
[17] Randolph Goode & Peter Hardin, Drug Eviction Notices Are Filed in Richmond, *Richmond News Leader*, June 26, 1990, at 1.

for increased police presence in eight public housing projects plagued by drug trafficking.[18] And in 1995, Richmond was given one of two federal grants awarded by the United States Bureau of Justice Assistance "to develop and implement a strategy to reduce homicides in the city . . . ."[19]

Despite the increased resources that were deployed to combat these evils, violent crime and drug-related activities continued in RRHA-managed neighborhoods. Indeed, "[t]he first six months of 1994 was the deadliest half-year in Richmond's history, as 78 people were shot, stabbed, bludgeoned or scalded to death by killers as young as 14 years old."[20] These killings were "fueled largely by arguments, drugs, alcohol and greed."[21]

This tragic situation posed serious consequences for the law-abiding residents and tenants of public housing developments. Recognizing their plight, RRHA and the City worked together to convert Richmond from "one of the nation's bloodiest cities into a model of crime-fighting prowess."[22]

The Development of the Trespass-Barment Policy

Understanding that the majority of crimes occurring in public housing were committed by outsiders[23] – especially

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[18] Area/State, Grant to Provide Officers, *Richmond Times-Dispatch*, Oct. 9, 1994, at B9.

[19] Dorine Bethea, City Gets $350,000 Grant to Plan Strategy for Curbing Homicides, *Richmond Times-Dispatch*, Dec. 13, 1995, at B-1.

[20] Mark Holmberg, First Half of '94 Sets Homicide-Rate Record, *Richmond Times-Dispatch*, July 5, 1994, at A1.

[21] *Id.*

[22] Carrie Johnson & Gordon Hickey, Back from the Brink; Deaths Dip as City Takes Blight Out of Crime, *Richmond Times-Dispatch*, Oct. 11, 1999, at A-1.

[23] Teresa Lemons, No-Trespassing Policy to Begin in Gilpin Court, *Richmond News Leader*, Nov. 9, 1990, at 17.

by persons who had no legitimate business or social purpose for being in its developments – RRHA implemented a no-trespassing policy in the Gilpin Court neighborhood in 1990. It was designed to promote the official enforcement of existing state law, *i.e.*, Va. Code Ann. § 18.2-119 ("Trespass after having been forbidden to do so; penalties").

In November 1990, RRHA issued a letter to residents advising them of this "No Trespassing" policy and inviting public questions and comments. Shortly thereafter, workers began to post 250 "No Trespassing" signs throughout Gilpin Court,[24] and RRHA released the following bulletin:

Trespassers Beware!!!

> Beginning November 20, 1990, [RRHA], in conjunction with the Richmond City Police, will begin prosecuting all trespassers in the Gilpin Court public housing community . . . .
>
> . . . .
>
> Our No Trespassing Policy was proposed by the Gilpin Safe Neighborhood Program Committee, which includes RRHA residents, RRHA staff, community leaders, and the Richmond City Police. We know that the majority of criminal activity that occurs in public housing is conducted by non-residents. This policy, which is part of our continuing effort to make our properties safe and crime-free, will allow residents to control who visits their community.

---

[24] Brian Kelley, Gilpin Court Trespassing Signs Go Up, *Richmond Times-Dispatch*, Nov. 9, 1990, at B4.

(emphasis in original) (internal quotation marks and citation omitted). The "No Trespassing" policy continued throughout the mid-1990s and was gradually extended into other RRHA public housing developments, including Whitcomb Court.

The Need to Privatize Streets and Sidewalks

Although this policy yielded commendable results,[25] it had only limited success because the sidewalks and streets of RRHA housing projects remained public property. Thus, if police officers saw unauthorized persons trespassing upon RRHA-owned buildings and grounds, these intruders could avoid arrest and prosecution by simply stepping onto an adjacent public street or sidewalk. More was needed for RRHA to protect the health, safety, and welfare of tenants.

In a memorandum dated December 16, 1996, Gloria Rogers (Whitcomb Court housing manager) recommended a solution to her superiors – that the streets within that complex be privatized. Street privatization promised to achieve the following benefits: reduce the sale of drugs on streets and sidewalks; hold criminals accountable for unlawful acts; cut crime in public housing; and abolish open air drug markets.

Three days later, RRHA officials told City police and civic leaders at a public safety meeting that RRHA gradually wanted to "close all public right-of-ways to public use and travel within all of their public housing communities." A formal request followed in February 1997.

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[25] *See* Teresa Lemons, Public Housing Gentry's Calling Now, *Richmond News Leader*, Feb. 28, 1992, at 19 (discussing the Gilpin Court program and observing that "[p]reliminary police statistics show violent crimes in public housing decreased 5 percent from 1990 to 1991").

The Need to Reduce Illegal Activity in Whitcomb Court

The streets of Whitcomb Court, which is home to families living in 441 units, were among those selected first for privatization. This designation was not accidental. Long known as "one of the city's most violent and troubled housing projects,"[26] Whitcomb Court had been a popular venue for open air drug dealing.[27]

It was a place where a drug dealer choked to death trying to swallow packages of heroin,[28] an innocent 18-year-old woman was randomly killed when another teen fired a .45-caliber pistol into a passageway "[o]ut of frustration" because "a friend had been robbed of drugs,"[29] children could find guns while walking and bring them to an elementary school,[30] crack rocks were found under carpets lying on the street[31] or in a housing unit "in the refrigerator next to milk for a baby,"[32] assault rifles and other weapons stashed by drug dealers were found in trashcans,[33] and U.S. mail delivery was temporarily halted at a time when "many residents were expecting Social Security and other assistance

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[26] Mark Holmberg, Where the Past Blights the Present, *Richmond Times-Dispatch*, Aug. 30, 1998, at B1.

[27] Battino Batts Jr., Police Unit is Forcing the Issue: Strike Force Hits Drugs, Arms, *Richmond Times-Dispatch*, May 2, 1993, at B1.

[28] Area/State, Bag Got Stuck in Suspect's Throat, *Richmond Times-Dispatch*, Dec. 21, 1990, at B6.

[29] Alan Cooper, City Youth Gets 10-Year Term for 'Recklessness' in Girl's Death, *Richmond News Leader*, Nov. 7, 1990, at 24.

[30] Robin Farmer, Two Expelled Pupils Will Return to School, *Richmond Times-Dispatch*, Jan. 28, 1993, at B3.

[31] Sara Oppenheim, Patrol Officer Encounters Variety on Beat; Helping People is Policeman's Job Incentive, *Richmond Times-Dispatch*, Sept. 2, 1993, at B8.

[32] Area/State, Attempted Rape, Other Charges Dropped, *Richmond Times-Dispatch*, Sept. 7, 1990, at B5.

[33] Mark Holmberg, Raiding Trash Nets Contraband; Whitcomb Court Cleanup Turns Up Illegal Cache of Guns, Drugs, and Cash, *Richmond Times-Dispatch*, Aug. 3, 1994, at A1.

checks" because a postman was frightened after witnessing a murder.[34]

Within Whitcomb Court, the 2300 block of Bethel Street was especially violent – a block where a man was murdered while children played nearby,[35] major heroin and crack cocaine suppliers set up their shops[36] and dealt drugs within 1,000 feet of an elementary school,[37] a teenager was shot in the head while simply sitting in a car,[38] angry "words and a punch in the face" could lead to a deadly or paralyzing gunshot wound,[39] and police might find fifty people – several screaming – surrounding a fatality, but no witnesses.[40] The corner of Bethel and Deforrest Streets was "the city's most notorious drug corner."[41] Unsurprisingly, that corner and the 2300 block of Bethel Street were included in the streets and sidewalks of Whitcomb Court selected for privatization.

Officials from RRHA and the City further discussed privatization efforts in March 1997. At that time, the City police had "expressed support" for the proposed policy. It stated that "[t]he Police Department is expected to be the

[34] Gordon Hickey, Whitcomb Court Gets Mail Back but Postal Carriers Receive No Special Police Protection, *Richmond Times-Dispatch*, Oct. 5, 1994, at B1.
[35] Mark Holmberg, Crime Has Cut a Path Through Her Family: Grandmother Wonders Why It Went So Wrong, *Richmond Times-Dispatch*, Mar. 11, 1994, at A1.
[36] Alan Cooper, Murder, Drug Dealing Draw 2 Life Terms, *Richmond Times-Dispatch*, Apr. 25, 1996, at B3.
[37] Randolph Goode, Six Indicted in Whitcomb Court Case, *Richmond Times-Dispatch*, June 24, 1995, at B1.
[38] Area/State, Two Hurt in Separate Shootings, *Richmond Times-Dispatch*, Jan. 19, 1993, at B3.
[39] Frank Green, Encounter among Friends Was Deadly, *Richmond Times-Dispatch*, Sept. 13, 1991, at B11.
[40] Area/State, South Side Man Killed; Woman, 18, Shot in Head, *Richmond Times-Dispatch*, July 19, 1990, at B5.
[41] William Ruberry, Wrestling Richmond's Bad Guys, *Richmond Times-Dispatch*, May 2, 1994, at A1.

primary enforcement unit that will issue summons [sic] and arrest persons for violating trespassing rules and other infractions," and that

> [t]he primary focus in [law] enforcement will be to deter street level drug dealing, hanging out on street corners by non-residents and to discourage non-residents from entering public housing communities, except for legitimate social or business reasons.

In a letter dated April 11, 1997, RRHA's Director of Public Housing verified that if privatization were approved, "RRHA's only intent as owner of the streets, will be to help control . . . traffic that frequents our neighborhoods for illegal or other disruptive purposes." Although residents and school buses could "travel to and from Whitcomb Court as they do now," "the streets [and sidewalks] will clearly be marked as RRHA-owned private property."

The City Planning Commission unanimously voted to recommend approval of the closing of public rights-of-way in Whitcomb Court after a public hearing in May 1997.[42] On May 12, 1997, after a public hearing, City Council adopted Ordinance No. 97-143-124, which privatized the interior streets and sidewalks in Whitcomb Court, according to its powers under Va. Code Ann. § 15.2-2006, and §§ 2.03(a) and 2.04 of the City Charter. A newspaper editorial lauded the decision,[43] noting that it would make

> it easier to rid projects of criminals – often outsiders – preying on law-abiding residents

[42] Gordon Hickey, Roads Plan Aimed at Curbing Crime, *Richmond Times-Dispatch*, May 6, 1997, at B3.
[43] Editorial, The Streets, Richmond Times-Dispatch, May 17, 1997, at A6. *See generally* Editorial, In Good Hands, *Richmond Times-Dispatch*, Mar. 17, 1998, at A10.

> and transforming what should be peaceable habitations into combat zones.

This ordinance was amended on June 23, 1997 by Ordinance No. 97-181-197, so that City police could enforce traffic laws on the privatized streets. Similar ordinances privatizing streets in other RRHA-managed neighborhoods followed.

The City renounced its legal interest in the streets and sidewalks of Whitcomb Court by letter dated July 23, 1997. Two days later, the City deeded these thoroughfares over to RRHA, which subsequently authorized City police to enforce state criminal trespass laws on all of its properties.

RRHA erected "No Trespassing" signs on the streets and sidewalks of Whitcomb Court, so that people would know that Whitcomb Court was private property, and that their unauthorized presence would subject them to arrest.

The Success of the Trespass-Barment Policy

Statistical evidence compiled by the Crime Analysis Unit of the Richmond Police Department demonstrates that overall monthly crime rates declined in Whitcomb Court after the trespass-barment policy was implemented.[44]

01/01/96-07/31/97 (17 months before policy effected) [No. per month]	08/01/97-12/31/98 (19 months after policy effected) [No. per month]	01/01/99-06/05/02 (last 42 months policy in effect) [No. per month]
Violent: 2.4	2.1	1.9
Property: 5.6	4.1	4.2
Total: 8.0	6.2	6.1

[44] Due to a systems error, violent crimes and property offenses occurring on Deforrest Street during the period 01/01/00-06/05/02 are not included in the third column.

This notable reduction was a contributing cause to a general trend in Richmond, where the number of homicides (160 in 1994)[45] – dropped from 94 in 1998 to 69 in 2001 – the lowest total in the city since 1983.[46]

Hicks' Legal Challenge to the Trespass-Barment Policy

Under this policy, Kevin Lamont Hicks was arrested twice in 1998 for trespassing in Whitcomb Court, and a third time for damaging property in Whitcomb Court. Hicks was barred from Whitcomb Court (and all other RRHA property) on April 14, 1998. He signed the written barment notice that was served on him on that date. That notice plainly stated that he was not to trespass on RRHA property, and that if he did so in the future, he would be subject to arrest. The notice also recited the following excerpt from Virginia's criminal trespass statute, Va. Code Ann. § 18.2-119:

> 'If any person without authority of law goes upon or remains upon the lands, buildings, or premises of another, or any part, portion or area thereof, after having been forbidden to do so, either orally or in writing by the owner, lessee, custodian, or other person lawfully in charge thereof, or after having forbidden to do so by a sign or signs posted . . . on such lands, buildings, premises or portion of area thereof at a place or places where it may be reasonably seen . . . he and/or she shall be guilty of a Class 1 Misdemeanor.'

[45] Evelyn V. McGill, Letter, Poor Lifestyle Choices Damage Innocents, *Richmond Times-Dispatch*, Sept. 20, 2001, at A20.
[46] Jim Mason, Homicide Rate Drops; Toll of 69 on 2001 Is Lowest Since 1983, *Richmond Times-Dispatch*, Jan. 2, 2002, at B1.

In January 1999, Hicks was arrested for trespassing on the sidewalk of the 2300 block of Bethel Street by a policeman who knew about Hicks' barment. Hicks was convicted in general district court. That conviction was later affirmed by the Circuit Court for the City of Richmond, and by a divided three-judge panel of the Court of Appeals of Virginia in a decision reported at 535 S.E.2d 678 (2000).

The Court of Appeals of Virginia, sitting *en banc*, reversed Hicks' conviction in a 6-5 decision reported at 548 S.E.2d 249 (2001), because the majority concluded that RRHA's trespass-barment policy was unconstitutional. In a 5-2 decision, the Supreme Court of Virginia affirmed that conclusion on the "narrow basis" that the trespass-barment policy was overbroad in violation of the First Amendment. Commonwealth v. Hicks, 563 S.E.2d 674 (2002). Two dissenting justices believed that the trespass-barment policy did not target First Amendment activity, that Hicks was not engaged in expressive conduct at the time of his arrest, and that the policy was valid because it sought "to create a safe, drug-free environment for the residents of Whitcomb Court." 563 S.E.2d at 685 (Kinser & Lemons, JJ., dissenting).

Ominous Evidence that Crime Is on the Rise

Despite the past success of law enforcement efforts, violent crime has increased in the months following the Supreme Court of Virginia's decision below. In 2002, the number of homicides in the City increased 20% from seventy to eighty-four. Twenty-nine (35%) of these murders occurred in November–December.[47]

[47] Mark Holmberg, Killings Rise in Richmond; Spike in Homicides Comes as Solved Cases Drop, *Richmond Times-Dispatch*, Jan. 3, 2003, at A1.

Unfortunately, Whitcomb Court is not immune from these trends. In September 2002, a man was found dead in a car parked on Whitcomb Street.[48] Later that month, a teen shot another teen in the back on Ambrose Street.[49] A woman who helped the victim lamented that "'we have to see young kids like him struggling for their lives because of dope.'"[50]

Open-air drug markets have returned to Whitcomb Court. Heroin is widely known to be available on Deforrest Street, crack cocaine on Ambrose Street, and marijuana on Bethel Street. When trespassers and other criminals see the police approach, they do, in fact, step onto the sidewalks and into the streets as they did before the trespass-barment policy was effected in 1997, thereby avoiding prosecution. They do not fear arrest or reprisal because of the decision below.

SUMMARY OF ARGUMENT

The overbreadth analysis conducted by a majority of the Supreme Court of Virginia conflicts with the well-settled jurisprudence of this Court in at least three principal areas.

First, this Court has held that an individual lacks standing to make an overbreadth challenge if his actions fall within the core of the conduct being regulated. Here, RRHA adopted a trespass-barment policy to reduce drug-related and other criminal activity in Richmond public housing, and to prevent outsiders from unlawfully trespassing on RRHA-owned private property after being forbidden to do so. Hicks was twice arrested for trespassing in Whitcomb Court, and a third time for causing property damage in Whitcomb Court.

[48] Area/State, Police Identify Shooting Victim, *Richmond Times-Dispatch*, Sept. 11, 2002, at B8.
[49] Area/State, Teen Charged with Shooting Another, *Richmond Times-Dispatch*, Sept. 18, 2002, at B4.
[50] Jim Mason, Teenager Is Shot, Critically Wounded, *Richmond Times-Dispatch*, Sept. 17, 2002, at B7 (citation omitted).

On each occasion, he was found guilty, but his sentence was suspended. Hicks was banned from RRHA properties in April 1998 for these and other offenses. Because Hicks' conduct falls squarely within the non-protected conduct proscribed by the trespass-barment policy, he lacked standing to raise an overbreadth argument.

Second, this Court has repeatedly held that whenever a policy restricts conduct, not speech, that policy may not be stricken as overbroad and violative of the First Amendment unless the overbreadth is both "real" and "substantial as well, judged in relation to the [policy's] plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). The trespass-barment policy was adopted to meet tenant concerns about criminal acts committed by outsiders in public housing. It was not directed at limiting First Amendment activities, and there was no evidence that it has diminished or even chilled protected speech or conduct. When Hicks was arrested for trespassing in Whitcomb Court after RRHA had validly barred him from coming into that community, he stated that he was delivering diapers for one of his children. This conduct was not entitled to any First Amendment protection. Hicks, 563 S.E.2d at 683-85 (Kinser & Lemons, JJ., dissenting) (citing *inter alia* Broadrick, 413 U.S. at 615).

Finally, assuming *arguendo* that the trespass-barment policy encroached upon protected speech, this Court has held that the government can adopt content-neutral restrictions on speech in a non-public forum so long as those limitations are reasonable. Whitcomb Court was clearly a non-public forum when its streets and sidewalks were privatized, the "No Trespassing" signs were erected, and the trespass-barment policy went into effect – all of which occurred before Hicks' barment from that forum and arrest.

ARGUMENT

I. This Court should reverse the decision below and enter final judgment for the Commonwealth because public housing authorities have discretion to fight drug-related and other criminal activities in their neighborhoods and because Kevin Hicks, who was not engaged in expressive conduct at the time of his arrest, lacked standing to challenge the trespass-barment policy on overbreadth grounds.

At the federal level, as this Court has recognized, Congress has acknowledged that drug dealers are "increasingly imposing a reign of terror on public and other federally assisted low-income tenants," that "drugs lead[] to murders, muggings, and other forms of violence against tenants, and . . . deterioration of the physical environment" in which they live, and that persons have a right to live, and to raise their families, in "public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs." Rucker, 122 S. Ct. at 1232, 1235 (internal quotation marks and citations omitted).

These concerns motivated Chief Justice Rehnquist, writing without dissent for seven other justices and himself in Rucker, to conclude that the law affords public housing authorities "discretion to evict tenants for the drug-related activity of household members and guests" regardless of whether the tenant knew about or suspected criminal acts on the premises. 122 S. Ct. at 1233.

Unfortunately, the residents of Whitcomb Court and other public housing developments in Richmond have for years been exposed to the scourges of drugs that have negatively impacted the quality of life in their neighborhoods. Rucker, 122 S. Ct. at 1235. Indeed, more than a decade ago, when reviewing the reasonableness of

RRHA's "good faith" lease-based efforts at that time "to improve the safety and quality of life in public housing," and "stem the rising tide of crime and violence," one federal judge found that a "widespread presence of drugs and guns" has "created an atmosphere of fear and intimidation which now permeates" all "Richmond public housing." Richmond Tenants Org., Inc. v. Richmond Redevelopment and Housing Auth., 751 F. Supp. 1204, 1205 (E.D. Va. 1990), *aff'd*, 1991 WL 230214 (4th Cir. Nov. 8, 1991).

The concerns in Rucker and Richmond Tenants Org. mirror those that compelled RRHA, in coordination with the City, to seek to lower illegal drug and other criminal activity in Whitcomb Court through a trespass-barment policy that targeted the conduct, but not the speech, of non-residents.

Although the majority and dissent[51] understood the undeniable public safety rationale behind RRHA's policy, the majority wrongly concluded that Hicks could nevertheless "challenge the validity of his conviction on the basis that the Housing Authority's practices and procedures contravened his constitutional rights." Hicks, 563 S.E.2d at 677. Rather than analyze the nature or quality of his conduct at the time of his arrest, the majority merely observed that decisions from this Court and the Supreme Court of Virginia have "permitted criminal defendants to assert constitutional challenges to various ordinances in criminal prosecutions."

[51] *Compare* Hicks, 563 S.E.2d at 676 ("In an effort to eradicate illegal drug activity in Whitcomb Court, which was described as an 'open-air drug market,' [RRHA] sought to deny access to its property to persons who did not have legitimate reasons to visit the housing development. The majority of persons who had been arrested for drug crimes at the Whitcomb Court housing development were individuals who did not live there."), *with id.*, 563 S.E.2d at 685 (Kinser & Lemons, JJ., dissenting) ("The undisputed purpose of the [trespass-barment] policy is to create a safe, drug-free environment for the residents of Whitcomb Court. It cannot be questioned . . . that the prevention of crime in public housing is a legitimate governmental goal.") (citing Rucker, 122 S. Ct. at 1232).

Id. (citing *inter alia* Lovell v. City of Griffin, 303 U.S. 444 (1938)). This erroneous perception of standing conflicts with this Court's recognition that only those whose rights to speech have possibly been silenced or chilled have standing to claim overbreadth.

It is apparent that whenever a person's conduct "falls within the core of the regulation" at issue, he "lacks standing to contend that the regulation is vague and overbroad." Haig v. Agee, 453 U.S. 280, 309 n.61 (1981) (citing Parker v. Levy, 417 U.S. 733, 755-56 (1974)). *See also* Brecheisen v. Mondragon, 833 F.2d 238, 243 (10th Cir. 1987), *cert. denied*, 485 U.S. 1011 (1988) (holding that "'a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court'") (quoting Broadrick).

In Broadrick, three public servants challenged as both vague and overbroad the portion of a state act that prohibited governmental employees from, *inter alia*, soliciting political contributions, running for paid public office, and engaging in other partisan activity. 413 U.S. at 602-06. Both arguments failed. First, this Court deemed the vagueness claim "all but frivolous" because the state statute was written "'in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with . . . .'" *Id.* at 607-08 (citation omitted). Second, the act was not overbroad because it regulated "political activity in an even-handed and neutral manner." *Id.* at 616. This Court stated that judicial concern over an allegedly overbroad standard "attenuates as the . . . behavior . . . moves from 'pure speech' toward conduct . . . that . . . – even if expressive – falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over

harmful, constitutionally unprotected conduct."[52] *Id.* at 615. Notably, this Court further explained that although laws,

> if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect – at best a prediction – cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.

Id. (citation omitted). *See also* Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 799 (1984) (citing favorably this principle); Ferber, 458 U.S. at 770 (same).

Here, that "point" was reached and clearly exceeded. As noted *supra*, Hicks had been convicted on multiple prior occasions for trespassing in Whitcomb Court. He was ultimately barred from that community, and all other RRHA neighborhoods, on that basis. Moreover, the state trial court judge who first tried Hicks had ordered him in open court not to return onto RRHA property. Rather than heed these legal directives, Hicks proceeded to trespass again in Whitcomb Court. When he was stopped and questioned by a policeman who knew about Hicks' barment, he indicated that he was delivering diapers, not engaging in protected speech. Hicks, 563 S.E.2d at 684 (Kinser & Lemons, JJ., dissenting).

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[52] *See also* New York v. Ferber, 458 U.S. 747, 770 (1982); Dodger's Bar & Grill, Inc. v. Johnson County Bd. of County Comm'rs, 32 F.3d 1436, 1442-43 (10th Cir. 1994) (expressive conduct was too attenuated for First Amendment protection); United States v. Gilbert, 813 F.2d 1523, 1530-31 (9th Cir.), *cert. denied*, 484 U.S. 860 (1987) (no overbreadth where "possibility of the statute's reach into substantial, impermissive, protected activity appears remote") (quotation at 1531), *overruled in part on other grounds*, United States v. Hanna, 293 F.3d 1080 (9th Cir. 2002); Aiello v. City of Wilmington, 623 F.2d 845, 852-56 (3d Cir. 1980).

Hick's conduct at the time of his arrest was clearly not subject to any First Amendment protections, and did not afford him any basis to raise a facial overbreadth challenge below. Broadrick, 413 U.S. at 612 ("[O]verbreadth claims, if entertained at all, have been curtailed when invoked against ordinary criminal laws that are sought to be applied to protected conduct."). RRHA's trespass-barment policy was clearly designed to help eliminate crime and reduce drug-related activity in public housing, not to chill any forms of protected speech. It is equally clear that Hicks' "undisputed conduct . . . fell clearly within the challenged" RRHA policy. *Cf.* Fisher v. Coleman, 639 F.2d 191, 192 (4th Cir. 1981) (*per curiam*) (affirming that defendant's fifty-nine convictions in roughly two years for public drunkenness did not confer standing to challenge alleged overbreadth of statute prohibiting sale of alcohol to a "habitual drunkard").

The majority's citation below to Lovell in conferring standing on Hicks was misplaced. In Lovell, this Court invalidated an ordinance that sought to bar the distribution of "'circulars, handbooks, advertising, or literature of any kind'" without a permit. 303 U.S. at 447, 450-52 (quotation at 450). That ruling has no bearing when, as here, the conduct being proscribed (trespassing and criminal activity, including drug-related activity) does not chill speech.

Because Hicks knew that he had been banned from RRHA properties, never appealed or challenged his barment, and then proceeded to trespass in Whitcomb Court on private property after he had been warned not to do so, his conduct unequivocally fell within the scope of the trespass-barment policy, and the Supreme Court of Virginia erred by not denying his overbreadth challenge *ab initio* for lack of standing.

II. This Court should also reverse the decision below and enter final judgment for the Commonwealth because any alleged overbreadth in the trespass-barment policy was neither real nor substantial in light of the policy's legitimate sweep.

Assuming *arguendo* that Hicks had standing to raise an overbreadth challenge, the majority below erred through its refusal to recognize that RRHA's trespass-barment policy bars conduct, not speech. Thus, the trespass-barment policy could only be stricken as overbroad if the overbreadth was both real and substantial. Broadrick, 413 U.S. at 615 (noting that "where conduct and not merely speech is involved . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep"). Because Hicks offered no evidence of real or substantial overbreadth, the decision below should not stand.

It is readily apparent that a policy designed to reduce trespassing, and drug-related and other criminal activities, is one that reaches conduct, not speech. *See, e.g.*, United States v. Bader, 698 F.2d 553, 556 (1st Cir. 1983) (regulation of disorderly conduct did not target speech); Champagne v. Gintick, 871 F. Supp. 1527, 1533 (D. Conn. 1994) (anti-stalking law only prohibited conduct); People in Interest of J.M., 768 P.2d 219, 224 (Colo. 1989) (juvenile curfew law regulated conduct); Commonwealth v. Moyer, 35 Pa. D. & C.3d 475, 488 (Pa. Ct. Common Pleas 1984) (noise law directed towards conduct, not communication). Thus, when conduct is primarily involved, a policy is not made overbroad because it can theoretically be extended to include speech. Taxpayers for Vincent, 466 U.S. at 800 ("It is clear . . . that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.") (internal footnote omitted).

Moreover, this Court confirmed in Ferber that it has

> 'repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied' . . . . '[T]he presumption must be that only substantially overbroad laws set up the kind and degree of chill that is judicially cognizable.' Moreover, '[without] a substantial overbreadth limitation, review for overbreadth would be draconian indeed. It is difficult to think of a law that is utterly devoid of potential for unconstitutionality in some conceivable application.'

458 U.S. at 770 n.25 & 772 n.27 (citations omitted). It also verified that "substantial overbreadth" can only arise if a law or policy reaches "'a substantial number of impermissible applications . . . .'" *Id.* at 771.

Here, Hicks had the burden to show that the trespass-barment policy was "substantially overbroad" – *i.e.*, Hicks had to demonstrate that there is "a realistic danger that the [trespass-barment policy] itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." Taxpayers for Vincent, 466 U.S. at 801. *See also* Thorburn v. Austin, 231 F.3d 1114, 1121-22 (8th Cir. 2000) (no such danger in law prohibiting targeted picketing against specific person); State v. Bouye, 484 S.E.2d 461, 465 (S.C.), *cert. denied*, 522 U.S. 822 (1997).

But the realistic danger here arises not from the trespass-barment policy itself, but by its absence. For years, tenants in Whitcomb Court and other neighborhoods were

"victims of an extraordinarily high incidence of crime, much of which is connected to illegal drug traffic." Richmond Tenants Org., 751 F. Supp. at 1207. As noted *supra*, RRHA devised and executed the trespass-barment policy to increase public safety, and lower criminal activity by unwelcome outsiders and trespassers, in its communities. The clear and present danger created by violent conditions in Whitcomb Court and other RRHA neighborhoods justified implementation of the policy. *See supra* text accompanying n.51. *See also* Khademi v. South Orange County Community College Dist., 194 F. Supp. 2d 1011, 1026 (C.D. Cal. 2002) ("The state has a compelling interest in the enforcement of its criminal laws.") (citing Branzburg v. Hayes, 408 U.S. 665, 700-01 (1972)).

In contrast to the policy's "plainly legitimate sweep," Broadrick, 413 U.S. at 615, the record displays no "real" or "substantial" concern that speech is being silenced.[53] Gloria Rogers testified that she had never denied permission to anyone wishing to distribute flyers in RRHA developments. During his criminal proceedings, Hicks offered no witnesses to establish that anyone had refused to come into Whitcomb Court for fear of arrest or prosecution[54] under the policy.

Simply stated, Hicks utterly failed his burden to show that the trespass-barment policy was chilling or prohibiting any protected, or arguably protected, speech. This is fatal to his overbreadth claim. Taxpayers for Vincent, 466 U.S. at 801 (no overbreadth in part due to lack of evidence of impact on third parties).

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[53] *See generally* Gormley v. Director, 632 F.2d 938, 942 (2d Cir.), *cert. denied*, 449 U.S. 1023 (1980) ("The risk that the statute will chill people from . . . the exercise of free speech is remote. The evil against which the statute is directed is both real and ugly.").

[54] Gloria Rogers testified that nobody is arrested until after being warned not to trespass on RRHA property. Her testimony was uncontested, and Hicks was admittedly arrested after being both warned and barred.

Because criminal conduct is not entitled to any First Amendment protections,[55] and because this appeal presents a "paradigmatic case of a [policy] whose legitimate reach dwarfs its arguably impermissible applications," this Court should reverse the error below and enter final judgment for the Commonwealth. Ferber, 458 U.S. at 773.

III. This Court should also reverse the decision below and enter final judgment for the Commonwealth because privatized sidewalks and streets owned by a local housing authority constitute a non-public forum.

Although the Supreme Court of Virginia held that the trespass-barment policy was overbroad in violation of the First Amendment, the majority did not consider whether the privatized streets and sidewalks of Whitcomb Court are public or non-public fora.[56] Instead, it vacated that portion of the Court of Appeals' decision below without addressing that issue. Hicks, 563 S.E.2d at 681.

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[55] *See, e.g.*, Trushin v. State, 384 So. 2d 668, 674 (Fla. Dist. Ct. App. 1980), *approved*, 425 So. 2d 1126 (Fla. 1982) (no substantial overbreadth where law "confined to non-protected, clearly criminal conduct"); People v. Jamesson, 768 N.E.2d 817, 824 (Ill. App. Ct.), *appeal denied*, 2002 Ill. LEXIS 1208 (Ill. Oct. 2, 2002) (unlawful contact with street gang members not protected by First Amendment); State v. Woodworth, 234 N.W.2d 243, 250 (N.D. 1975) (no substantial overbreadth where law "intended to regulate conduct which threatens the public peace").

[56] The mere fact that Hicks was arrested on a sidewalk is not dispositive of this issue. United States v. Kokinda, 497 U.S. 720, 727-29 (1990) (sidewalk from a parking lot to a post office was a non-public forum); Hawkins v. City and County of Denver, 170 F.3d 1281, 1287 (10th Cir.), *cert. denied*, 528 U.S. 871 (1999) (pedestrian walkway not generally utilized "as a throughway to another destination" was non-public forum); American Civil Liberties Union v. City of Las Vegas, 13 F. Supp. 2d 1064, 1074 n.2 (D. Nev. 1998), *appeal dismissed*, 1999 U.S. App. LEXIS 6700 (9th Cir. Feb. 4, 1999) ("[N]ot all public sidewalks are traditional public fora.") (citing *inter alia* Kokinda).

Assuming *arguendo* that the trespass-barment policy can be properly subjected to a First Amendment overbreadth challenge,[57] the majority below erred in subjecting the policy to a strict scrutiny analysis because Hicks was in a non-public forum at the time he was arrested under a policy that was both reasonably related to the purpose of that forum and viewpoint-neutral. This conclusion is compelled by principles that are firmly rooted in decisions of this Court.

First, "'the First Amendment does not guarantee access to government property simply because it is owned or controlled by the government.'" Taxpayers for Vincent, 466 U.S. at 814 (citation omitted). *See also* Sammartano v. First Judicial Dist. Court, 303 F.3d 959, 966 (9th Cir. 2002) ("'[N]ot all publicly owned property becomes a public forum simply because the public is permitted to come and go at the site'") (citation omitted); Hawkins, 170 F.3d at 1287.

Second, "'[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.'" Greer v. Spock, 424 U.S. 828, 836 (1976) (quoting Adderley v. Florida, 385 U.S. 39, 47 (1966)).

Third, the government can put persons on notice of a non-public forum by erecting some sort of "indication . . .

[57] The dissenting justices on the Supreme Court of Virginia analyzed the trespass-barment policy under the Fourteenth Amendment, not the First Amendment, because the policy "does not directly regulate activity protected by the First Amendment" and because Hicks "was not engaged in speech or expressive" conduct when arrested. Hicks, 563 S.E.2d at 682, 684 (Kinser & Lemons, JJ., dissenting). *See also* Thompson v. Ashe, 250 F.3d 399, 407 (6th Cir. 2001) ("Because the no-trespass policy does not implicate any fundamental right, we review it under the rational basis standard.").

that they have entered some special type of enclave."[58] Grace, 461 U.S. at 180.

Here, by prominently erecting "No Trespassing" signs "every 100 feet" along these very streets and sidewalks, RRHA put all on notice that Whitcomb Court and its streets and sidewalks were now "private property . . . owned by RRHA" and that "[u]nauthorized persons will be subject to arrest and prosecution." Hicks, 563 S.E.2d at 676. Those signs gave prominent notice that Whitcomb Court was a non-public forum, and were clearly visible to Hicks when he was arrested.

Arguably, RRHA did not have to privatize the streets and sidewalks in order to effect its trespass-barment policy. In Daniel v. City of Tampa, 843 F. Supp. 1445 (M.D. Fla. 1993), *aff'd*, 38 F.3d 546 (11th Cir. 1994), *cert. denied*, 515 U.S. 1132 (1995), a case squarely on point with Hicks, the United States Court of Appeals for the Eleventh Circuit upheld the Tampa Housing Authority's trespass-barment policy against someone clearly engaging in expressive conduct (unlike Hicks) without any finding that the streets or sidewalks in Tampa public housing had been privatized (unlike Hicks).

Like RRHA, the Tampa Housing Authority had used a trespass-barment policy "to deter drug transactions" in areas known to "have a history of drug problems." 843 F. Supp. at 1446. Plaintiff had been arrested three times in two years for trespassing in public housing properties to distribute leaflets and post signs. *Id.* at 1447. He ultimately challenged the trespass-barment policy on various

[58] *See also* Brister v. Faulkner, 214 F.3d 675, 682 (5th Cir.), *cert. denied*, 531 U.S. 985 (2000) (public forum where no indicia present); Hawkins, 170 F.3d at 1287; United States v. Gilbert, 130 F.3d 1458, 1460-61 (11th Cir. 1997), *cert. denied*, 523 U.S. 1088 (1998) (non-public forum set off by a row of planters across plaza).

constitutional grounds, including that it was overbroad and violative of the First Amendment. *Id.* at 1446-47. The district court rejected his arguments and entered judgment as a matter of law for the housing authority in part because these properties were non-public fora. *Id.* at 1447. The fact that the housing authority "never allowed non-residents to solicit, canvass, or distribute literature on its properties, and the lack of a formal policy forbidding this activity [did] not amount to the designation of the property as a public forum." *Id.* Thus, strict scrutiny did not apply, and the policy easily met the reasonableness standard because it was tied to "the public's compelling interest in keeping out dangerous drug dealers," and was not content-based in nature. *Id.* at 1447-48 (quotation at 1448).

The Eleventh Circuit affirmed, noting that the

> official mission of the Housing Authority is to provide safe housing for its residents, not to supply non-residents with a place to disseminate ideas. Further, in practice, access to Housing Authority property is carefully limited to lawful residents, their invited guests, and those conducting official business. We therefore have little difficulty concluding that the Housing Authority property is a nonpublic forum.

38 F.3d at 550 (citing *inter alia* Kokinda, 497 U.S. at 727).

Here, it is equally beyond dispute that the privatized streets and sidewalks of Whitcomb Court are non-public fora. Whitcomb Court does not have to be transformed into a gated

community[59] or a "'mental concentration camp[]'"[60] in order for this non-public status to attach. This is especially true in light of its unique geography – it is bounded by an interstate highway, and its interior streets and sidewalks cannot be used as shortcuts to destinations beyond that neighborhood.

Because Hicks was not engaged in protected speech at the time of his arrest pursuant to a trespass-barment policy that did not chill the exercise of First Amendment rights, the analysis in Daniel and Thompson[61] should control. Likewise, this Court should reverse the erroneous ruling below, uphold the constitutionality of RRHA's trespass-barment policy, and enter final judgment for the Commonwealth.

CONCLUSION

In March 2000, a city resident rhetorically asked: "Does a child in Whitcomb Court have the same likelihood of happiness and success as a child born anyplace else in the U.S.? If the answer is no, we have [] work to do."[62]

At that time, a child being raised in Whitcomb Court was protected in no small part by a trespass-barment policy designed to reduce crime and to provide him or her with a much safer environment in which to grow. This frontline policy failed not because it chilled speech, but because the Supreme Court of Virginia wrongly likened Hicks, who was

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[59] Gordon Hickey, Richmond to Get $2 Million for Police from Crime Bill; 18 New Officers Financed for Three Years, *Richmond Times-Dispatch*, Oct. 11, 1994, at B3 (observing that this concept was once considered).

[60] Lea Setegn, Where Will They Go? Planned Public Housing Losses Worry Residents, *Richmond Times-Dispatch*, May 13, 2002, at A1 (citation omitted).

[61] *See supra* text accompanying n.57.

[62] Robin Farmer, Candidates Have a Parental View, *Richmond Times-Dispatch*, Mar. 22, 2000, at B6.

delivering diapers, to someone who was engaged in "door-to-door canvassing and pamphleteering." Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Village of Stratton, 122 S. Ct. 2080, 2086 (2002). This was error.

In Rucker, this Court held without dissent that "local housing authorities . . . are in the best position to take account of . . . the degree to which the housing project suffers from 'rampant drug-related or violent crime," and to implement "'reasonable steps to prevent or mitigate the offending action.'" 122 S. Ct. at 1235 (citations omitted). If the analysis below is allowed to stand, RRHA, and other public housing authorities across the United States, will lose that discretion, and the ability to help protect tenants from deadly external forces. This should not be allowed to occur.

For the reasons discussed above, and for the reasons explained by the Commonwealth and other supporting *amici* in their briefs, this Court should reverse the decision below by the Supreme Court of Virginia, and enter final judgment for the Commonwealth.

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(11) FILED MARCH 7, 2003 (EAB)

No. 02-371

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

KEVIN LAMONT HICKS,

Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

BRIEF OF *AMICI CURIAE* COUNCIL OF LARGE PUBLIC HOUSING AUTHORITIES, HOUSING AND DEVELOPMENT LAW INSTITUTE, HOUSING AUTHORITY RISK RETENTION GROUP, NATIONAL ASSOCIATION OF HOUSING AND REDEVELOPMENT OFFICIALS, NATIONAL ORGANIZATION OF AFRICAN-AMERICANS IN HOUSING, AND PUBLIC HOUSING AUTHORITIES DIRECTORS ASSOCIATION IN SUPPORT OF THE PETITIONER

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No. 02-371

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COMMONWEALTH OF VIRGINIA,
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INTERESTS OF THE AMICI CURIAE[1]

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[1] In compliance with Rule 37.6 of this Court, *amici curiae* state that the counsel named below authored this brief in its entirety, and no party or entity other than the *amici curiae* made a monetary contribution to the preparation or submission of this brief. The parties have consented to the

Council of Large Public Housing Authorities (CLPHA) is a not-for-profit organization whose membership consists of 55 of the largest public housing authorities (PHAs) in the country. CLPHA members collectively own and manage 40% of the nation's public housing stock. CLPHA's function is to educate and advocate on behalf of its membership before the United States Congress and various government agencies, including HUD, and to research and develop policy on matters relevant to the operations and funding of public housing.

Housing and Development Law Institute (HDLI) is the only national nonprofit organization whose mission is to serve as a legal resource to local public housing and redevelopment agencies and their legal counsel. Since 1984, HDLI has worked to enlighten its members with respect to all legal aspects of state and federal housing law and policy. In addition to serving as *amicus* in appropriate cases important to its membership, HDLI provides its members with current and timely information concerning the myriad legal issues relating to affordable and public housing. It does this by publishing legal periodicals, conducting conferences and other educational activities, and providing legal training and individualized counseling.

The Housing Authority Risk Retention Group (HARRG) is a captive mutual insurance company owned by PHAs. It was licensed in 1987 in the State of Vermont and operates under the Federal Liability Risk Retention Act of 1986. The company is the largest single PHA liability insurer, writing liability insurance coverage for PHAs that

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filing of this brief. The consents have been filed with the Clerk of the Court.

own more than fifty percent (50%) of the public housing units nationwide.

National Association of Housing and Redevelopment Officials (NAHRO) is a nationwide nonprofit organization dedicated to facilitating local community development and the provision of decent, safe and sanitary housing to low-income families. Formed in 1933, with membership including approximately 2900 agencies and 16,000 local officials, NAHRO is the oldest and largest national membership organization devoted to affordable housing and community development. NAHRO's member agencies own or manage more than 95% of all public housing in the United States. NAHRO has played a key role in the development and implementation of the nation's housing programs since their inception.

The National Organization of African-Americans in Housing (NOAAH) is a member organization comprised of government officials, professionals, and consultants working in the field of affordable housing, as well as residents of various forms of affordable housing, including public housing. NOAAH provides technical, operational and moral support to its members and offers opportunities for professional skills enhancement, resident training, and economic development. NOAAH's national network of proactive housing advocates partner with industry and government to design and implement fair housing policies and programs as well as innovative strategies that improve the quality of housing services delivery and promote healthy, vibrant communities.

Public Housing Authorities Directors Association (PHADA) is a nationwide nonprofit advocacy organization formed in 1979 whose membership consists of approximately 1900 executive directors of public housing authorities. In addition to advocating for better, more

efficient administration of the federal affordable housing programs, PHADA conducts a variety of training and educational activities concerning the development and operation of affordable housing.

The organizations comprising the *amici curiae*, represent public housing authorities and those entities and individuals responsible for managing virtually all of the nation's public housing units. In addition, *amicus curiae* HARRG and its member PHAs have a particular interest in this matter as an insurer against PHA liability arising out of criminal and tortious acts occurring on public housing property. The *amici curiae* believe that the legal standards governing the authority of PHAs to bar and/or remove individuals from public housing properties vitally impact upon the ability of PHAs successfully to manage the developments in their inventory. The *amici curiae* further believe that, if sustained, the decision under review will have a disastrous effect upon the efficacy of PHAs' efforts to meet their legal responsibility to combat illegal drugs and crime in public housing developments and, consequently, upon the physical and social well-being of the hundreds of thousands of law-abiding residents of public housing.

SUMMARY OF ARGUMENT

The power to protect PHA property through implementation of trespass-barment policies is a crucial and widely-used tool for PHAs seeking to prevent potential wrongdoers from gaining access to public housing grounds. In order to fulfill their duties of maintaining resident safety and security, PHAs must have the authority to bar individuals who do not have a legitimate reason for their presence on PHA-owned property, and must be able to rely on state trespass laws as a means of effecting such bars. In the absence of such authority, public housing residents

remain vulnerable to the scourge of drug-related and criminal activities that currently plagues public housing properties.

With respect to the administration of their properties, PHAs act as landlords, not as entities carrying out sovereign functions. Because they have little or no regulatory authority with respect to the general public, PHAs occupy, as a practical matter, substantially the same footing as private landlords. It is therefore inappropriate, as the Virginia Supreme Court has done, to impose additional constraints on the efforts of PHAs to protect their residents and property from unwarranted intrusion merely because PHAs are governmental entities.

Contrary to the Virginia Supreme Court's apparent assumption, public housing developments are not public fora. Where PHAs take steps to exercise dominion over streets and sidewalks within public housing developments to which they hold title, those streets and sidewalks are likewise nonpublic fora, and PHAs are entitled to use available trespass-barment policies to limit access to these areas.

Given its breadth and scope, the opinion of the Virginia Supreme Court under review threatens to cripple PHAs in their efforts to maintain safety and security on the properties that they own and manage. By holding the Richmond Redevelopment and Housing Authority's trespass-barment policy facially unconstitutional because it could, hypothetically, be implemented in a fashion that would violate speech rights, the Virginia Supreme Court has placed the burden on PHAs of justifying, in every instance, an individual's exclusion from public housing property. The difficulties of implementing any system that would satisfy

the Virginia Supreme Court's criteria would render virtually any PHA trespass-barment policy effectively impracticable.

ARGUMENT

I. THE USE OF STATE TRESPASS STATUTES BY PHAs TO CONTROL UNWARRANTED ACCESS BY NONRESIDENTS TO PUBLIC HOUSING DEVELOPMENTS IS ONE OF THE PRIMARY VEHICLES THROUGH WHICH PHAs SEEK TO PROVIDE SAFE AND SECURE LIVING ENVIRONMENTS.

PHA "trespass-barment" policies, such as the one at issue in this case, are one of the principal tools employed by PHAs to assure safe living environments for their tenants. Typically, these policies provide for charging certain individuals with criminal trespass if found upon public housing property after having been given a written warning by PHA personnel or local police officers acting on the PHA's behalf. Grounds for initial warnings may vary from simple loitering on the PHA's residential properties without an apparent right to be present or the commission of criminal acts ranging from property damage (as in the case at issue) or vandalism to extremely serious violent or drug-related criminal activity.

Along with tenant evictions, strict admissions procedures, and certain federally and locally sponsored crime suppression programs, PHA trespass-barment policies are a principal means through which PHAs address illegal drug and other crime problems in public housing. That these problems have been pervasive in some public housing

developments is well-known to this Court.[2] *Amici curiae* believe that, if sustained, the decision of the court below will virtually eliminate the use of this vital tool that is intrinsic to the ability of PHAs, as landlords, to control their premises.

The use of trespass-barment policies is prevalent among PHAs,[3] and PHAs that have adopted such policies frequently use them.[4] Virtually all housing authorities

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[2] In *Dep't of Hous. and Urban Dev. v. Rucker*, this Court stated that "[w]ith drug dealers 'increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants,' Congress passed the Anti-Drug Abuse Act of 1988." 535 U.S. 125, 127 (2002). The preamble to the 1988 legislation contains the following findings: (1) "public and other federally assisted low-income housing in many areas suffers from rampant drug-related or violent crime," (2) "drug dealers are increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants," (3) "the increase in drug-related and violent crime not only leads to murders, muggings, and other forms of violence against tenants, but also to a deterioration of the physical environment that requires substantial government expenditures," and (4) "the Federal Government should provide support for effective safety and security measures to combat drug-related and violent crime, primarily in and around public housing projects with severe crime problems . . . ." 42 U.S.C. § 11901. The brief of *amicus curiae*, Richmond Redevelopment and Housing Authority, compellingly illustrates that, for some housing authorities, these Congressional findings remain fully and distressingly accurate.

[3] A survey conducted in February 2003 by *amici curiae* CLPHA, NAHRO and PHADA indicated that approximately 85% of responding PHAs (287 of 338 respondents) have adopted trespass-barment policies. The respondents own and operate more than 126,000 units of public housing.

[4] Data generated in the survey by *amici curiae* indicated that approximately 90% of respondents having trespass-barment policies actually used them to bar or arrest one or more individuals within the 12-month period preceding the survey. PHAs that kept data concerning frequency of use reported that the policy was used to bar or arrest an individual on average 36 times during such annual period. PHAs estimating the frequency with which their policies were used, estimated

having such policies have put them in place as a measure to control crime and drugs in their developments and to protect residents.[5] Available data suggest that PHAs with trespass-barment policies consider them essential both for controlling crime and drugs in their developments and for the safety and well-being of public housing residents.[6]

A. PHAs HAVE A LEGAL RESPONSIBILITY TO PROVIDE SAFE PREMISES, AND THE USE OF TRESPASS-BARMENT POLICIES FOR THIS PURPOSE IS CONSISTENT WITH BOTH FEDERAL POLICY AND PHAs' OBLIGATIONS, AS LANDLORDS, UNDER COMMON LAW.

Federal law and policy have long mandated that public housing authorities provide safe public housing premises to their residents. This legal responsibility has consistently appeared in federal policy regarding affordable housing.[7] In addition to expressions of policy, Congress has

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that they used the policy to bar or arrest, on average, 53 times during this annual period.

[5] Almost all (97%) of the respondents in the survey by *amici curiae* stated that they had adopted their trespass-barment policies "in whole or in part as a measure to protect residents from crime or illegal drugs."

[6] In the survey by *amici curiae*, 284 of 287 PHAs reporting that they had adopted trespass-barment policies answered that they considered such policies to be "essential to controlling crime and drugs in [their] developments,", and all 287 reported that they considered their policies to be "essential for the safety and well-being of residents" in their developments.

[7] The actions of PHAs to foster safe living environments for their tenants are in keeping with numerous general and specific directives in federal statutes and regulations. Statements of national housing policy include the goal of "a decent home and a suitable living environment for every American," 42 U.S.C. § 1441; a national objective "to help make neighborhoods safe and livable," 42 U.S.C. § 12702(4); a purpose of a

also enacted specific statutory directives to public housing authorities to ensure the safety of their residents and the properties that they manage and own. Section 5A(d) of the 1937 Act, codified at 42 U.S.C. § 1537c-1(d), requires each PHA to submit an annual plan, describing, among other things, what measures it is taking to ensure the safety of its residents, including crime prevention measures and coordination with local police departments. Section 6(*l*)(3) of the 1937 Act, codified at 42 U.S.C. § 1437d(*l*)(3), requires each PHA to obligate itself, in its tenant leases, to maintain the public housing project in a decent, safe, and sanitary condition.

The security of residents is also taken into account in monitoring and evaluating the management performance of PHAs, which is undertaken by the Department of Housing and Urban Development (HUD) on a regular basis using an evaluation system known as the Public Housing Assessment System. One of the performance indicators contained in this assessment system is security. This indicator addresses how well a PHA performs in adopting "anticrime strategies," coordination of such strategies with local government officials and residents, tracking crime related problems in its developments, and reporting incidents to local police. 24 C.F.R. § 902.43(a)(5). HUD's assessment system also evaluates the success of anticrime measures through resident surveys in which residents are asked, among other things, specifically how safe they feel in their units, building and parking area, and whether they are aware of any crime

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1998 statute which extensively revised the public housing statute "to promote homes that are affordable to low-income families in safe and healthy environments," Quality Housing and Work Responsibility Act of 1998, P.L. No. 105-276, § 502(b), 112 Stat. 2520 (1998); and the United States Housing Act of 1937 (1937 Act), one of the purposes of which is to remedy the "shortage of decent and safe dwellings for low-income families," 42 U.S.C. § 1437(a)(1)(A).

prevention program available to residents. 24 C.F.R. § 902.53(a)(i)(C); Public Housing Assessment System Resident Service and Satisfaction Scoring Process, 65 Fed. Reg. 40,034 (2000).

Resident safety *vis-a-vis* nonresidents has also been an important consideration in the design of public housing developments in recent years. For example, PHAs undertaking new construction or major renovations of public housing projects have taken into account the principles of "crime prevention through environmental design," more commonly known as CPTED, as a tool for crime interdiction through the definition and protection of property boundaries. Chief among those CPTED principles is the notion of "defensible space," whereby residents of a public housing site enjoy private space identifiable with a given unit, as well as common areas within a development distinguishable from public ways. Measures that PHAs and other communities have implemented in order to create defensible space include dedicated entry ways for each residential unit, so-called "eyes on the street" unit placement (whereby each housing unit fronts on a street, thus permitting observation of activities in common areas and rights of way associated with a given unit), gating, and privatization of streets running through and around PHA properties.[8] In privatizing the streets and sidewalks around Whitcomb Court, the Richmond Redevelopment and Housing Authority (RRHA) has not engaged in some manner of legerdemain to avoid legal or constitutional constraints, but rather has simply

[8] *See* OSCAR NEWMAN, U.S. DEP'T OF HOUS. AND URBAN DEV., CREATING DEFENSIBLE SPACE, 13-23 (1996) (discussing benefits of street privatization in St. Louis, Missouri); U.S. DEP'T OF HOUS. AND URBAN DEV. & CONGRESS FOR THE NEW URBANISM, PRINCIPLES FOR INNER CITY NEIGHBORHOOD DESIGN, 24-27 (2000) (discussing "eyes on the street," creation of private space, gating of communities).

implemented a measure consistent with CPTED principles and recommended by federal authorities.[9]

Finally, *amici curiae* note that, in addition to federal requirements, PHAs, like other landlords, are increasingly held legally responsible to ensure the well-being of their residents under emerging principles of state common law.[10] Both PHAs and their insurers may suffer serious liability for failure to exercise due care in protecting tenants against intruders.[11] By way of illustration, since June 1987, *amicus*

[9] *See* U.S. DEP'T OF JUSTICE, KEEPING ILLEGAL ACTIVITY OUT OF RENTAL PROPERTY: A POLICE GUIDE FOR ESTABLISHING LANDLORD TRAINING PROGRAMS, 18-21 (2000); "Security Planning for HUD-Assisted Multi-Family Housing," HUD-PIH Directive No. 7460.4, § 19.

[10] Traditionally, under common law, a landlord had no duty to protect tenants from harm by others. This is no longer the case. Increasingly, courts are imposing duties upon landlords, public and private alike, to exercise due care to protect their tenants against criminal harm that is reasonably foreseeable. *See, e.g., Ortiz v New York City Housing Authority*, 22 F. Supp. 2d 15 (E.D.N.Y. 1998) (housing authority deemed 60% liable for rape of tenant where it failed to provide adequate building security to prevent entry of intruder); *Zuniga v. Housing Authority of the City of Los Angeles*, 41 Cal. App 4th 82, 48 Cal. Rptr. 2d 353 (Cal. App. 1995) (housing authority liable for firebombing of family by purported drug dealers where it had failed to make arrests or erect barriers to keep out intruders); *Daly v. City of New York et al.*, 626 N.Y.S.2d 409 (S. Ct. N.Y. 1995) (New York City Housing Authority held to have a duty to protect passers-by where it was aware of recurring violence on the common areas of a housing project); *Tenny v. Atlantic Associates*, 594 N.W. 2d 11 (Iowa 1999) (while not an insurer of tenants' safety, landlord owed a duty of care to protect plaintiff, who had been raped, from reasonably foreseeable harm).

[11] Minimizing such losses is a matter of no small import. The federal law pursuant to which *amicus curiae* HARRG was established arose out of a crisis among PHAs (as well as other entities) that were unable to obtain liability insurance on the private market. In light of the substantial liability that PHAs faced at that time – and continue to face – liability

curiae HARRG has paid a total of $20,785,780.00 in premises liability claims due to inadequate security. In addition, HARRG maintains an outstanding reserve of $1,716,294.00 for similar claims. This represents a total of $22,502,074.00 across 465 claims, and fully ten percent of HARRG's total claims payment over sixteen years.

B. THE ABILITY TO REMOVE AND BAR INDIVIDUALS WHO ARE NOT MEMBERS OF TENANT HOUSEHOLDS, AS WELL AS INDIVIDUAL HOUSEHOLD MEMBERS WHO ENAGAGE IN CRIMINAL ACTIVITY, IS VITAL TO THE ABILITY OF PHAs TO CONTROL DRUGS AND CRIME IN THEIR PUBLIC HOUSING DEVELOPMENTS.

Viewed in the appropriate context, PHA trespass-barment policies, as well as their physical "defensible space" strategies to prevent unwanted intrusion, must be seen as complementing the remedy of evictions in PHAs' efforts to combat illegal drugs and crime in public housing. Just as the eviction process allows the PHA to address these problems from within, trespass-barment policies afford a remedy to be applied externally to persons other than those who have a contractual relationship with the PHA. As the brief of *amici curiae*, Richmond Redevelopment and Housing Authority and City of Richmond in support of the petition for certiorari amply illustrates, a substantial portion of the serious crime on public housing premises is generated by the presence of nonresidents over whom the PHA has no control.

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insurance for PHAs had become cost-prohibitive. In order to ease this burden, the Congress passed the Liability Risk Retention Amendments of 1986, P.L. No. 99-563, §§ 12(b)-12(d), 100 Stat. 3177 (1986), under which PHAs were able to create captive insurance companies more sensitive to the particular needs and exposure of PHAs, and less driven by maximization of profits.

Trespass-barment policies are the principal means through which the PHAs reduce the risk of crime perpetrated by nonresidents. Without such policies, PHAs must, in their crime control efforts, rely entirely on catching criminal offenders in the act – even those who have a record of past offenses on housing authority property - on each and every occasion. Given the resources available to most PHAs, their ability to carry out security measures in this fashion is, to say the least, limited.[12] Because of the practical difficulties that such a direct enforcement strategy entails, the trespass-barment power is not only the preferred method of protecting public housing residents and property, it is – for all intents and purposes – the only effective method of doing so with respect to nonresidents.

It is worth noting that PHAs also utilize trespass-barment policies for lease enforcement under circumstances where they wish to avoid evicting an entire family because of criminal conduct on the part of one of the members of the household. Under such circumstances, written barment from the premises enforced by arrest for trespass may be used to enforce an agreement by the family to exclude a household member who has engaged in criminal activity as a condition to continued tenancy for the remaining members of the household.[13] This use of the policy has, of course, the

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[12] This is particularly so in light of recent cuts in funding directed at crime control on public housing properties. The former Public Housing Drug Elimination Grant Program (PHDEP) allowed PHAs to pay for security and surveillance services that they could not otherwise afford using the limited operating assistance they received from the federal government. However, as of federal fiscal year 2002, Congress eliminated PHDEP funding, and thus deprived PHAs availing themselves of PHDEP assistance of a crucial resource in fighting crime on their properties.

[13] HUD regulations at 24 C.F.R. § 966.4(*l*)(5)(C) provide:

salutary effect of preserving the tenancy of the remaining household members in circumstances where the entire household would otherwise be subject to eviction.

Finally, as owners of the scarce resource that is public housing, PHAs have both a right and duty to protect public housing properties as well as tenants. The association between physical deterioration of buildings and common areas in public housing developments plagued by crime is well-known. The ability to restrict access to public housing properties to residents and other authorized persons is crucial to preserving this important national asset.[14]

C. THE USE OF TRESPASS-BARMENT POLICIES BY PHAs IS SANCTIONED BY STATE LAW THAT IS APPLICABLE TO ALL PROPERTY, WHETHER PUBLIC OR PRIVATE.

The authority for PHAs to implement trespass-barment policies does not reside in federal law, although, as noted previously, such policies are fully consistent with, and operate in furtherance of, federal housing law and policy. Rather, these policies find their authorization in state-enacted "trespass after warning" statutes, of which Va. Code § 18.2-119 is typical.[15] Trespass-after-warning laws are equally applicable to all property and may be used by both public and private owners. Thus, a PHA exercising its prerogatives as landlord under these state laws does so upon the same legal footing as any private owner. In fact, PHAs have greater need to control access to their properties through the use of these policies than do private unsubsidized landlords who do not, as do PHAs, have explicit obligations under federal law to provide safe premises.

As this Court noted in its opinion in *HUD v. Rucker*, the federal regulatory scheme invests each PHA with significant discretion with respect to determining how it will exercise its rights as a landlord, including how and when it will employ the remedy of eviction. PHAs also have considerable discretion with respect to the manner in which they control their premises *vis-a-vis* nonresidents. As with the remedy of eviction, someone must make the determination whether enforcement of a state trespass statute is warranted. As the entities created under state law to own and operate public housing, it is appropriate that PHAs are empowered to exercise this discretionary function as they do the many other discretionary functions necessary to carrying out their mission as owners and landlords.

> (C) *Exclusion of culpable household member.* The PHA may require a tenant to exclude a household member in order to continue to reside in the assisted unit, where that household member has participated in or been culpable for action or failure to act that warrants termination.

[14] Congress has estimated that the federal government has invested more than $90 billion in public housing assets. Quality Housing and Work Responsibility Act of 1998, P.L. No. 105-276, § 502(a)(2), 112 Stat. 2520 (1998).

[15] Va. Code § 18.2-119, provides in pertinent part:

> Trespass after having been forbidden to do so; penalties. – If any person without authority of law goes upon or remains upon the lands, buildings or premises of another, or any portion or area thereof, after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian or other person lawfully in charge thereof, or after having been forbidden to do so by a sign or signs posted by such persons ... on such lands, structures, premises or portion or area thereof at a place or places where it or they may be reasonably seen ... he shall be guilty of a ... misdemeanor.

II. IN MANAGING THEIR HOUSING PROJECTS PUBLIC HOUSING AUTHORITIES ACT AS LANDLORDS, NOT AS SOVEREIGN ENTITIES.

Because of the unique role that PHAs serve in the scheme of government, it is appropriate to treat PHAs more as landlords than as government bodies when carrying out their appointed purposes. Certainly, a government entity, "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 800 (1985) (internal quotations and citation omitted). This is doubly true in the context of a PHA because it seldom operates in a capacity other than that of a property owner. Much like a public library or a state hospital, a PHA's primary functions are not "sovereign" in nature (*e.g.*, regulatory, taxing, or enforcement).[16] Rather, PHAs perform a direct service for a defined population. To the extent that a PHA acts as a "regulator" with respect to its constituency, it does so by way of a contractual agreement. This Court has stated, for example, that when a PHA evicts a tenant, it "is acting as a landlord of property that it owns" and not as a sovereign. *Rucker*, 535 U.S. at 135. That is, the terms and conditions that a PHA places on admission to and continued occupancy of a public housing unit apply to a resident through the lease executed between the PHA and the resident. Limitations and controls on resident conduct flow only through that document. Even so, this Court has not viewed PHA actions to enforce lease terms as sovereign acts, but instead as those

[16] In fact, the provision of housing is not historically a function that government entities have performed. It was only after the passage of the 1937 Act, which established the system of federally-assisted low-income housing, that most state and local governments took on the task of providing such housing.

of "a landlord of property that it owns, invoking a clause in a lease to which [a tenant] has agreed . . . ." *Id.*

By contrast, a PHA has remarkably little authority over nonresidents entering onto its properties simply by virtue of the fact that it has no contractual arrangement with members of the general public. In this respect, the PHA stands even more clearly in the posture of a property owner – and not that of a regulator or enforcer – in its dealings with the general public than it does in its dealings with its clientele. Consistent with this role, the primary – if not sole – power that a PHA might exercise with respect to a nonresident is the same one as is available to a private property owner, *i.e.*, to attempt to deny that person entry to a site.

However, the greater the constraints or conditions that the courts place on PHAs in relying on that power, the less capable a PHA is of ensuring the safety and integrity of its developments as effectively as any other landlord might be. If, because a PHA is a special purpose unit of local government, it cannot rely on trespass-barment remedies with substantially the same measure of freedom as other landlords, it would yield a perverse inequity not only as between PHAs and landlords of unassisted properties, but also as between PHAs and other landlords providing similar types of affordable housing. The federal government relies on a variety of types of housing owners under several programs to implement its housing goals: local public housing authorities, private nonprofit organizations, limited profit entities, for-profit entities, and, recently, various combinations of these types of entities. The choice of a particular form of affordable housing provider is largely a function of historical factors, such as the date of program enactment, rather than any intrinsic differences in the housing type or how it should be operated. Like public

housing, assisted housing projects operated by private owners are governed by contracts entered into with HUD and by many of the same or similar rules applicable to public housing.

Subjecting PHAs to additional limitations, through the First Amendment or otherwise, above and beyond those applicable to private owners of subsidized housing effectively places residents of public housing in an inferior position to residents of privately-owned affordable housing. This is emphatically so where the decision, such as the one under review, has the effect of prejudicing the safety and well-being of public housing tenants. The safety and welfare of a low-income tenant should not depend on the form of affordable housing available to that tenant – be it public housing or privately-owned subsidized housing. Residents of public housing should not bear greater safety risks because of the structure of the program serving those residents.

III. THE WHITCOMB COURT HOUSING PROJECT, INCLUDING THE STREETS AND SIDEWALKS IN AND AROUND THE PROJECT, CONSTITUTES A NONPUBLIC FORUM.

In contrast to the *en banc* decision of the Virginia Court of Appeals, the decision of the Virginia Supreme Court does not engage in an analysis either of the type of forum at issue or of the standard it would apply in determining the constitutionality of the PHA's trespass-barment policy. Rather, the Virginia Supreme Court appears to assume for the purpose of its decision that the PHA property at issue is a public forum. However, any reliance by the Virginia Supreme Court on the premise that the PHA's property is a public forum is misplaced.

This Court has divided government-owned property into three separate categories for First Amendment purposes. They are: the traditional public forum, the designated public forum and the nonpublic forum. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983).

As this Court noted in *Perry*, the traditional public forum is epitomized by the "streets and parks which 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Id.* at 45 (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). Sidewalks are also usually considered to be a public forum. *United States v. Grace*, 461 U.S. 171, 179-180 (1983). However, *Grace* instructs that not every public sidewalk is a public forum. *United States v. Kokinda*, 497 U.S. 720, 728 (1990). Rather, "the location and purpose of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum." *Id.* at 728-729.

This Court has, in several instances, determined that government-owned real property constitutes a nonpublic forum. For example, in *Greer v. Spock*, 424 U.S. 828 (1976), this Court held that the streets and sidewalks of Fort Dix, although open to the public, were a nonpublic forum. Likewise, in *Kokinda,* the Court found that the sidewalk outside the entrance of a Post Office was a nonpublic forum. Similarly, in *Adderly v. Florida*, 385 U.S. 39 (1966) the Court determined that the driveway and adjacent area outside the Leon County jail in Florida were part of the jail's curtilage and, as such, were a nonpublic forum. [17]

[17] Although *Greer* and *Adderly* were decided before the forum analysis established by *Perry*, it is clear from subsequent decisions that, in the context of *Perry*, the Court now views both the streets and sidewalks at

In response to the rampant drug and crime problems at Whitcomb Court, the streets and sidewalks in and around Whitcomb Court were privatized by the transfer of ownership to the Richmond Redevelopment and Housing Authority. This was done because, as in *Adderly*, security concerns are paramount and serve as the catalyst for the implementation of the trespass policy at issue. Moreover, as the dissent in the Virginia Court of Appeals *en banc* decision noted, the Richmond Redevelopment and Housing Authority took the additional steps of notifying the public of the private character of the Whitcomb Court streets and sidewalks through the prominent display of "no trespassing" signs, through public meetings and pamphleting, and by expressly limiting access to the streets to "school buses, delivery trucks, city service vehicles and law enforcement . . . ." *Hicks v. Virginia*, 548 S.E.2d 249, 260 (Va. App. 2001) (Humphreys, J. dissenting).

It would therefore appear that the Richmond Redevelopment and Housing Authority employed every reasonable measure short of barricading the Whitcomb Court streets and sidewalks in staking its claim to its property. In this respect, the PHA's actions in this circumstance bear out the converse of the Court's observation in *Marsh v. Alabama*, 326 U.S. 501, 506 (1946), that "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." That is, the Richmond Redevelopment and Housing Authority obtained title to the streets and sidewalks at issue here, it placed the public on notice of the limited purposes for which those streets and sidewalks were

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issue in *Greer* and driveway and adjacent area at issue in *Adderly* as nonpublic forums.

dedicated, and, as is evident from the Respondent's citation and arrest, undertook to enforce its rights with regard to its property. Accordingly, as in *Adderly*, the Court should treat the streets and sidewalks at issue as part of the curtilage of Whitcomb Court. As such, they are clearly a nonpublic forum. *Cf. Vasquez v. Housing Authority of City of El Paso*, 271 F.3d 198 (5th Cir. 2001), *vacated for reh'g en banc*, 289 F.3d 350 (5th Cir. 2002) (both majority and dissent agreed that housing authority property is a nonpublic forum); *Daniel v. City of Tampa*, 38 F.3d 546, 550 (11th Cir. 1994) (housing authority property is a nonpublic forum).

Once it is determined that Whitcomb Court, including the streets and sidewalks in and around the project owned by the RRHA, is a nonpublic forum, the trespass policy at issue is constitutional under the First Amendment if it is reasonable and not an effort to suppress expression merely because public officials oppose a speaker's view. *Perry*, 460 U.S. at 46. The policy does not need to be the most reasonable or the only reasonable limitation. *Cornelius*, 473 U.S. at 808. Moreover, "[i]t is a long-settled principle that government actions are subject to a lower level of First Amendment scrutiny when 'the governmental function operating... [is] not the power to regulate or license, as lawmaker, . . . but, rather, as proprietor, to manage [its] internal operations . . . .'" *Kokinda*, 497 U.S. at 725 (quoting *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 896 (1961)).

In this case, the trespass policy at issue was implemented to protect the safety of the residents at the Whitcomb Court housing project by restricting the access of nonresidents to the project. The policy became necessary because of the prevalence of drug-related and other criminal activity in and around Whitcomb Court caused primarily by nonresidents. Clearly, the trespass policy implemented at

Whitcomb Court is reasonable and, in accordance with the standards enunciated by this Court, is constitutional under the First Amendment.

IV. THE DECISION OF THE COURT BELOW IS INCORRECT AS A MATTER OF LAW AND, IF SUSTAINED, WILL IRREPARABLY HARM THE ABILITY OF PHAs TO PROVIDE SAFE LIVING ENVIRONMENTS TO RESIDENTS OF PUBLIC HOUSING.

There is no dispute that the Respondent in this case had no intention of exercising a cognizable First Amendment right when arrested for the third time for trespass upon public housing property. The record reveals no assertion on respondent's part that, at the time of his arrest, he was engaged in, or that he intended to engage in, the exercise of protected speech.[18] Nor is he among the class of persons with respect to whom this Court has recognized a right of "intimate association."[19] Respondent was arrested and convicted on account of conduct that he well knew to be prohibited.

The Supreme Court of Virginia based its decision, not on the facts of the case, but rather upon a hypothetical

[18] *Cf. Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984) ("[I]t is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies.")

[19] In *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984), this Court recognized a right of intimate association protected by the First Amendment. The right to protection in a particular circumstance would be evaluated on the basis of a continuum under which "objective characteristics locate [the relationship] on a spectrum from the most intimate to the most attenuated of personal attachments."

state of facts involving a potential exercise of free speech that was not before the court. In this respect, the opinion in the court below is reminiscent of the opinion of the *en banc* Ninth Circuit Court of Appeals in *Rucker v. Davis*,[20] which purported to avoid the clear language of § 6(*l*)(6) of the 1937 Act in significant part because the court construed the statutory language as susceptible of interpretations that could produce "odd and absurd" results. Respondent was a trespasser, thrice arrested, who had been warned that he would be arrested if he again entered housing authority property.

The Virginia Supreme Court has, in substance, held that placing discretion in the hands of a housing authority official renders the trespass-barment policy *prima facie* invalid for overbreadth, regardless of the circumstance under which that discretion is or is not exercised. The very purpose of a PHA policy limiting access to public housing sites either through physical barriers or through threat of arrest is to place the onus of demonstrating a legitimate need to enter the property on the person seeking access. Approving the rationale of the court below would be tantamount to requiring that every circumstance under which an individual would have a right to be present protected under the First Amendment be codified in advance and that every denial of access to public housing property require individuated proof that the barred or arrested individual did not intend to exercise protected rights to speech. Such a requirement would impose an impracticable burden upon PHAs, who would be saddled with the responsibility of explaining, in each and every case, why their gates should be closed or doors locked against each non-resident that they seek to bar from entering onto their residential properties. Under such a judicial result, it is likely that PHAs would discover, as did

[20] 237 F.3d 1113 (9th Cir. 2001), *rev'd sub nom. Dep't of Hous. and Urban Dev. v. Rucker*, 535 U.S. 125 (2002).

the United States Postal Service, when faced with onerous requirements regarding control of its facilities that efforts to limit access would be rendered, for all intents and purposes, administratively impossible.[21] As mentioned, sustaining the holding of the court below would thus greatly limit the capacity of PHAs to reduce crime on their properties through protecting the physical boundaries of their residential developments against unwanted intrusion.

As noted above, the opinion ignores entirely the forum analysis that is customary under previous decisions of this Court, which has been applied by the circuit courts of appeal in more than one instance to uphold PHA trespass-barment policies. In so doing, it ignored the status of PHAs as landlords who are entitled, like other landlords, to exercise discretion in excluding nonresidents from their properties. Finally, the court below improperly based its decision on mere speculation.[22]

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[21] *See Kokinda*, 497 U.S. at 732.

[22] "[S]peculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications . . . .' " *Hill v. Colorado*, 530 U.S. 703, 733 (2000) (quoting *United States v. Raines*, 362 U.S. 17, 23 (1960)).

CONCLUSION

The Court should hold that the trespass-barment policy of the RRHA is constitutional under the First Amendment. Accordingly, the decision of the Virginia Supreme Court should be reversed.

March 7, 2003

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No. 02-371

APR 4 2003

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

COMMONWEALTH OF VIRGINIA,

Petitioner,

—v.—

KEVIN LAMONT HICKS,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF VIRGINIA, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Virginia is one of its state affiliates. Since its founding in 1920, the ACLU has vigorously defended the concept that public streets should be open to the public, and has articulated that position in numerous cases before this Court, including the seminal case of *Hague v. CIO*, 307 U.S. 496 (1939).

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 10,000 members and 28,000 affiliate members nationwide. Among the NACDL's objectives are to promote the proper and fair administration of justice and to ensure due process for persons accused of crime." To those ends, NACDL has appeared as amicus curiae in this Court on numerous occasions.

STATEMENT OF THE CASE

Whitcomb Court is a residential neighborhood in Richmond, Virginia comprised of multiple low rise apartment buildings that are neatly laid out on the city grid, with streets and traditional curb and gutter sidewalks. Until recently these were city owned streets. Title has since been transferred to the Richmond Redevelopment and Housing Authority (RRHA), which owns the apartments on the property directly adjacent to the streets. The City continues

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

to maintain and patrol the streets. The RRHA has adopted a policy prohibiting the use of the streets by non-residents, their guests, or others who cannot establish a *legitimate reason* for being there. Enforcement is left completely to the discretion of the local police without any requirement that they act on a complaint lodged by RRHA officials.[2]

The streets that run in and around Whitcomb Court are indistinguishable in form and function from the streets throughout Richmond and in thousands of subdivisions across the United States. Whitcomb Court is a neighborhood like any other and is fully incorporated into the broader residential community that surrounds it. There is an elementary school and playground directly west of the neighborhood and on public property that abuts one of the streets that has been transferred to RRHA (the 2100-2300 block of Sussex street). *See* map lodged with the Court by Respondent.[3] The neighborhood is not some isolated dead-end terminus lying at the outskirts of the city. There are no gates or checkpoints and the streets either intersect with or flow directly and seamlessly into other city streets. Even more so than a cul-de-sac or other residential subdivision that is commonly accessed by a single road, entry to the neighborhood here is as easy as stepping off the sidewalk at any point or driving through one of several streets that flow into other city streets. Under these circumstances,

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[2] Unless otherwise indicated, the facts cited herein are reported in the opinions below.

[3] *See* website for Richmond city schools. http://www.Richmond.112.va.us/schools/rpsredisign/es/Whitcomb/webpage1.html. Additionally, Whitcomb Court Recreation Center, located at 2302 Carmine Street (another "privatized" street), serves as the polling place for Richmond residents in the Sixth District, which includes voters who do not live in Whitcomb Court. http://www.sbe.state.va.us.VotRegServ/Polling_Place/PollingPlacecounty-city.asp>. In addition, a local Boys and Girls Club is located at the Whitcomb Court Recreation Center. *See* <http://www. Bgcmr.org/htl.joinclub/ joinclub_location.htm>.

enforcement of the "no trespass" policy is neither practical nor susceptible to evenhanded application.

People who live or visit the community continue to use the streets and sidewalks as a conduit in their daily affairs and as a place to meet and greet friends and neighbors. Vehicle and pedestrian traffic continues to flow through the neighborhood largely unfettered. Garbage is picked up by City service vehicles, school buses travel through, mail is delivered, the streets are patrolled by the City police, and the City continues to be responsible for the maintenance of the streets. Even First Amendment activity is routinely permitted according to the testimony of the Housing Director. J.A. 37-38. All these attributes perfectly define the quintessential public forum. The only thing that has changed is that people who are targeted for exclusion are now subject to arrest for the very same conduct that was previously beyond the reach of the law.

Concerned with the problems of inner-city blight that plague low income neighborhoods in every major city, Richmond and RRHA officials devised a plan to clean-up the streets in and around Whitcomb Court by targeting "drug dealers" and other people who threaten the safety of the community. The City would simply abandon all or part of the several streets that anchor the Whitcomb Court neighborhood. To accomplish this, the City adopted a resolution purportedly closing the streets and conveyed title to the RRHA. This was done with the full understanding that the streets would continue to function and be maintained as public streets for the use and enjoyment of the residents of that community, including their guests, as well as others who have a "legitimate" reason to be there. To ensure that the streets continued to function as they historically did, the City retained responsibility for maintenance of the streets and policing of the streets. The City also reserved a full-width utility easement for the placement of utility poles, sewage

lines and other utility services. These interests are all consistent with the city's ownership of the streets throughout Richmond.

After title to the streets was conveyed, the Housing Authority posted 'No Trespassing' signs and adopted a policy prohibiting "any unauthorized person from entering the property." The policy authorizes the Richmond Police to enforce the trespass laws of the state upon the property of Whitcomb Court. "[E]ach and every Richmond Police Department officer [is authorized] to serve notice, either orally or in writing , to any person [found on RRHA property] when such person is not a resident, employee, or such person cannot demonstrate a legitimate business or social purpose for being on the premises." Pet. App. 31. A printed brochure issued by RRHA to the Whitcomb Court residents similarly explains that the "no trespass" policy applies to all non-residents who cannot demonstrate that they are on the premises "visiting a lawfully residing resident, or on the development conducting legitimate business." *Id.*

The initial decision to bar someone from the streets of Whitcomb Court can be made either by the police or housing officials; in practice, it is more often the former than the latter. There is no clear procedure for contesting the decision, which can be delivered orally or in writing. There are also no written policy guidelines that define more precisely the circumstances under which a person can be barred. Most significantly, a person who has been barred and returns is subject to arrest for trespass even if there is a "legitimate" purpose for this second visit. Once barred, for example, a person can no longer visit immediate family members who live in Whitcomb Court (or any other public housing development in Richmond) without risking arrest. Pet. App. 32. The housing director testified that she is unaware of anyone ever being removed from the barred list. J.A. 35.

The respondent, Kevin Lamont Hicks, does not live in Whitcomb Court. His mother, his baby, and his baby's mother all do. Hicks had been previously barred from the property and twice previously convicted of trespass. His requests to visit his children have been denied by RRHA officials. There is nothing in the record that explains either his barment or his previous convictions.[4] In fact, RRHA officials have taken the position that Hicks can be barred for any and no reason. J.A. 13. His most recent arrest for trespass arose when he was observed walking along one of the streets of Whitcomb Court by an officer who recognized Hicks and knew that he had been barred from the property. The record indicates that he was on the property "bringing Pampers to his baby." The record also indicates that he has twice appealed to Housing Officials to allow him entry to Whitcomb Court in order to visit his family. Pet. App. 32.

Hicks moved to dismiss the case against him on several grounds -- including his right to move freely on the public streets and to visit with his children and his mother. The motion was denied and Hicks was convicted. His conviction was affirmed by the state intermediate court, and then reversed by an *en banc* court of appeals, which held that the streets in and around Whitcomb Court are indistinguishable from a traditional public forum and that the transfer of title from the City to RRHA was not sufficient to strip them of that status. Pet. App. 37-38. Specifically, the appeals court found that the streets continued to operate like other streets in Richmond and that the transfer of title had not fundamentally altered their form or function. *Id.*[5] Based

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[4] Hicks also has a conviction for destruction of property in Whitcomb Court,. However, it is uncontested that his barment was not related to that charge. Pet. App. 32.

[5] That conclusion is reinforced by the more fully developed record in another state case involving the same challenged policy. In contrast to this case, the trial court in *Commonwealth v.Green*, No. 00M-2225 (Cir. Ct. Richmond, 2000), heard four days of testimony concerning the

implementation and enforcement of the No Trespass policy by RRHA and the Richmond Police Department (RPD). The picture that emerges from that record is completely at odds with the description of how the streets function at Whitcomb Court that is being advanced by the Commonwealth in this case. The evidence in *Green* also shows that there is pervasive confusion over how the policy is implemented and enforced and, more importantly, how the police have been given unfettered discretion to enforce the policy as they see fit.

The most important testimony was from Tyrone Curtis, Executive Director of RRHA and the person in charge of housing management and policymaking at RRHA. He testified that the streets and sidewalks, despite the transfer of title, remain generally accessible to the public: "It has never been our intent to deny anyone from using the sidewalks or streets for their intended purpose." (July 31, 2000, Tr., p. 183); "[T]he streets, even through they've been privatized, are treated as public streets for their intended purposes." (July 31 Tr., pp. 197); "[T]hat was not the intended purpose to close the streets for other legitimate traffic." (July 31 Tr., pp. 230-31). According to Mr. Curtis, the RRHA property remains open to joggers, drive-through traffic, pedestrian "walk-through" traffic, and all public use and travel. (July 31 Tr., pp. 192, 197, 208. 230-231). Mr. Curtis also testified that, aside from the posted "no trespass" signs, no changes have been made in the appearance of the streets, and the public has continued to use the streets and sidewalks as public thoroughfares. (July 31 Tr., p. 268). RRHA officials Solomon Akinwande, acting director of housing operations and the director of housing management for RRHA, and Gloria Rogers, the on-site manager at Whitcomb Court, similarly testified that the property could be used as a public thoroughfare (July 26 Tr., p. 162; July 31 Tr., p.16).

When asked to explain the No Trespass policy in light of the broad public access, Mr. Curtis stated: "[A]nyone who is...on RRHA property, including a street that has been privatized, anyone who is not visiting someone in the community or conducting legitimate or legal or social activities in the community, is not welcome on the property." (July 31 Tr., p. 176). At points in his testimony, Mr. Curtis defined "legitimate" to mean "legal." (July 31 Tr., p. 179). He defined "unauthorized" as "persons who are committing illegal acts on the property or suspicion." (July 31 Tr., p. 272). At other points, he described trespassing as "malingering or loitering without any purpose." (July 26 Tr., p. 165). Mr. Akinwande explained that RPD officers were not issued written guidelines concerning the definitions of "unauthorized persons" or "legitimate business" because "I [Solomon Akinwande] don't think that would be reasonable to give a police officer, because this is a democratic society." (July 26 Tr., p. 136). In the same spirit, Mr.

on these findings, the appeals court struck down the "no trespass" policy as an unconstitutional infringement of the "'right to move from one place to another according to inclination,'" and right to "remain in a public place of [one's] choice." Pet. App. 40, quoting *Chicago v. Morales,* 527 U.S. 41, 53, 54 (1999). The Virginia Supreme Court affirmed on the grounds that the challenged policy was vague and overbroad in its impact on constitutionally protected First Amendment activity. Pet. App. 59. The state supreme court reached this conclusion without deciding the public forum issue.

SUMMARY OF ARGUMENT

Both the petitioner and the United States acknowledge that if the streets and sidewalks which traverse and partially surround Whitcomb Court are a public forum,

Akinwande stated that he did not believe the RPD had authority to challenge a person's stated reason for being on the property because "I don't think it is the right of the police officer to determine if the person has a right to be there." (July 26 Tr., p. 136). According to Mr. Akinwande, RPD may not stop someone to question them simply because the officers do not recognize the person (July 26 Tr., pp. 154-55), and if the person says "I am visiting someone," the police must let them go. (July 26 Tr., p. 140).

The police witnesses in Green presented a very different picture. Three police officers whose duties are concentrated in different RRHA housing communities, testified that guests must be in the presence of a resident at all times. (July 31 Tr., pp. 332-333; Aug. 1 Tr., p. 61). Officers approach persons they do not recognize as residents and order them to leave the property if they are not in the presence of a resident. (July 31 Tr., pp. 332-333). If a person refuses to answer police questions, they are detained and ultimately arrested if they are not cooperative. (July 31 Tr., p. 333). Uniformly, the officers testified that loitering – "hanging out" – is not permitted. (Aug. 1 Tr. 63; Aug. 17 Tr. 37). Arrests are made without prior warning or banning. (July 31 Tr., pp. 65; Aug. 17 Tr., p. 23). According to Officer Christopher Wade, vehicular drive-through traffic is permitted, but pedestrian walk-through traffic is not permitted. (July 31 Tr., pp. 330-332).

then the ability of Housing Authority officials and City police to enforce rules against loitering and trespass is severely limited. *See City of Chicago v. Morales*, 527 U.S. 41 (1999).[6] We agree with this assessment. Consequently, we also believe that the public forum issue is central to resolving this case. It is the State's burden to demonstrate that the conveyance of title from the City of Richmond to the Richmond Redevelopment and Housing Authority so fundamentally altered the form and function of these public streets that they no longer qualify as a traditional public forum. That burden has manifestly not been met on this record. Moreover, the State's failure to carry its burden of proof is even more glaring when one considers other evidence in the public record describing the nature and use of the streets in Whitcomb Court. *See* n.5, *supra*. We recognize, of course, tht the Virginia Supreme Court found it unnecessary to address the public forum question in its decision. But this Court can affirm that decision on any ground raised and argued below. If the Court finds that the streets at issue here are indistinguishable from the streets in many other residential neighborhoods, *see Frisby v. Schultz*, 487 U.S. 474 (1988), the "no trespass" policy cannot stand. If the Court determines that the record is insufficient to resolve the public forum question (and the decision is not affirmed on other grounds), we respectfully submit that the proper course is to remand for further proceedings on that issue.

The right to travel on the public streets is a basic aspect of the liberty protected by the Due Process Clause. Whether relying on vagueness or overbreadth or substantive First Amendment doctrine, this Court has repeatedly and

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[6] Petitioner's brief at 36 (as sovereign, government generally may not ban persons from public streets and sidewalks); Brief of the United States at 11 ("If the property at issue remains a public forum, then the vesting of discretion and the management of First Amendment issues become serious problems.").

consistently held that government officials cannot be given unfettered discretion to interfere with that right. *City of Chicago v. Morales*, 527 U.S. at 53-54; *Shuttlesworth v. City of Birmingham* 382 U.S. 87 (1965). The fact that legal title has passed to another government entity does not negate the public forum status of municipal streets under circumstances where they continue to function as municipal streets for all intent and purposes. *Hague v. CIO*, 307 U.S. 496, 515-16 (1939). The government cannot overcome that presumption by mere fiat; "it must alter the objective physical character or physical uses of the property, and bear the attended costs." *International Soc'y for Krishna Consciousness, Inc. v. Lee* 505 U.S. 672, 700 (1992) (Kennedy, J., concurring in judgment). No such alteration has occurred here.

This Court's decision in *Frisby* is controlling on the present record. Although the Housing Authority was established to provide safe and affordable housing for low-income residents, communities all across America seek to preserve the quality of life and the residential character of their neighborhoods through the adoption of zoning and other land use restrictions. While property owners can assuredly keep trespassers off their property, they have no right to prevent individuals from passing freely on the local streets and sidewalks. There is no reason to come to a different result in this case.

Finally, we emphasize that even when the government is acting in a proprietary capacity, as when it manages an airport or post office, there are constitutional limits on its discretion. Its regulations must be viewpoint-neutral and they may not unreasonably burden the exercise of constitutional rights. *Perry Educational Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983). Here, the undeniable impact of the challenged policy is to prohibit respondent from visiting his mother and children in their own homes. The Constitution protects these intimate

associations and the government cannot – as it has here – arbitrarily interfere with those interests. When he was arrested, respondent was not loitering or engaging in any other purported illegal activity. So far as the record discloses, he was carrying diapers on his way to see his child. The Housing Authority's position is that like any landlord it is free to exclude all guests for any and no reason. While this probably exceeds the common law authority of even private landlords, we submit that a policy that vests such unfettered discretion in Housing Authority officials is unreasonable on its face, and unconstitutionally interfered in this case with respondent's right to visit his immediate family.

ARGUMENT

I. THE STREETS AND SIDEWALKS RUNNING THROUGH AND AROUND WHITCOMB COURT ARE TRADITIONAL PUBLIC FORA

A. Whitcomb Court is a Residential Neighborhood Anchored by the Types of Streets and Sidewalks that this Court has Defined as a Public Forum in *Frisby v. Schultz.*

We begin with the proposition that streets and sidewalks have historically been considered to be public forums, with all that connotes for free public access.

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Hague v. CIO, 307 U.S. at 515-16 .[7]

Whether the government purports to be acting in its sovereign or proprietary capacity, it cannot place the streets of an entire residential neighborhood beyond the reach of the public forum doctrine. *Frisby v. Schultz*, 487 U.S. 474. There are no doubt thousands of subdivisions scattered throughout this country, like those involved in *Frisby* and in this case, whose streets are part of the daily life and transportation grid in those communities. Homes like the ones in *Frisby*'s residential subdivision were conceived, built and purchased as private residences and as havens from our loud and contentious inner cities. The residential character

[7] This Court has repeatedly reaffirmed the *Hague* principle. *See, e.g., United States v. Grace*, 461 U.S. 171, 179 (1983)("sidewalks, of course, are among those areas of public property that traditionally have been held open for expressive activities and are clearly within those areas of public property that maybe considered generally without further inquiry to be public forum property"); *Frisby v. Schultz*, 487 U.S. at 480; (Public streets are the "archetype of traditional public forum"); *Boos v. Barry* 485 U.S. 312, 318 (1988) (same); *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 315 (1968). ("streets....are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely"); *see also Carey v. Brown*, 447 U.S. 455, 460 (1980); *Hudgens v. NLRB*, 424 U.S. 507, 515 (1976); *Shuttlesworth v. Birmingham*, 394 U.S. at 147, 152 (1969).

of those streets, however, did not affect the forum analysis. *Id.* at 484.

No less is true in this case. While the residents of Whitcomb Court also seek haven from the blight of the city, the streets anchoring their community are like the streets in *Frisby* and communities everywhere. It seems incongruous to decide that these particular streets in Whitcomb Court are not a public forum simply because they involve a low-income residential neighborhood rather than the suburban neighborhood at issue in *Frisby*. After all, it is not as if the public forum doctrine originated in suburban America. Indeed, one of the Court's earliest First Amendment cases involved Federal Housing Authority property established for defense industry workers in a town established and owned by the United States. *See Tucker v. State of Texas,* 326 U.S. 517, 518-19 (1946).

The residential character of a street may affect the government's ability to impose time, place, or manner regulations, but the street nevertheless remains a public forum. Prior to *Frisby*, for instance, the Supreme Court twice upheld the right of demonstrators to picket the streets fronting the private residence of the Mayor of Chicago. *Carey v. Brown*, 447 U.S. 455 (1980); *Gregory v. City of Chicago*, 394 U.S. 111 (1969). In neither case was the residential character of the neighborhoods sufficient to transform the streets at issue from public to non-public forums. In *Frisby*, the Court characterized *Carey*'s description of the public streets and sidewalks in residential neighborhoods as "virtually foreclos[ing] appellant's argument." 487 U.S. at 480. The Court made a similar point in *Heffron v. International Society for Krishna Consciousness,* 452 U.S. 640 (1981), when it rejected the respondents' attempt to describe the state fairgrounds at issue in that case as a traditional public forum, like the public streets. "[I]t is clear that there are significant differences

between a street and the fairgrounds. A street is continually open, often uncongested, and constitutes not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people may enjoy the open air or the company of friends and neighbors in a relaxed environment." *Id.* at 651. Justice White's description in *Heffron* of a hypothetical "street" entitled to characterization as a quintessential public forum serves as an accurate description of the Whitcomb Court streets.

A holding that streets located in residential areas are not public forums would have far reaching consequences. Even if limited to government housing developments, it would have a significant impact in most major American cities. For that reason, this Court has held that "[n]o particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora." *Frisby v. Schultz* 487 U.S. at 480-81. That principle is controlling here.

B. The Streets in Whitcomb Court Continue to Have the Objective Attributes of a Public Forum Despite the Housing Authority's Adoption of a No Trespass Policy.

In *United States v. Grace*, the Court held that the sidewalks outside its own building were a public forum.

> Sidewalks, of course, are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property.

461 U.S. at 179.

That is equally true here. Formalities of title do not control the public forum analysis. *Hague v. CIO*, 307 U.S. at 515 ("wherever the title of streets and parks may rest, they have immemorially been held in trust for use by the public..."); *cf. Marsh v. Alabama,* 326 U.S. 501, 506 (1946) ("ownership does not always mean absolute dominion.") *See also Evans v. Newton,* 382 U.S. 296, 302 (1966) (mere fact of private ownership was not enough to divest the park of its "public character"; the Fourteenth Amendment applied "regardless of who now has title under state law").[8] Simply declaring an entity to be private "does not alter its characteristics so as to make it something more than it actually is." *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 393 (1995). The City of Richmond cannot transform public streets and sidewalks into private, non-public property simply by passing an ordinance declaring them "off limits" when they continue to otherwise function the same as they had in all previous respects. As Justice Kennedy has explained , in order to change a property's public forum status the State "must alter the objective physical character or uses of the property." *Lee,* 505 U.S. at 700 (Kennedy, J., concurring)[9]

[8] Indeed, title to streets and sidewalks often rests with the abutting landowner. *Cf. Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Commission* 518 U.S. 727, 792 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) (observing that in the majority of jurisdicitions, title to some of the most traditional of public fora, streets, and sidewalks remain in private hands). *See also* 10 A E. Mc Quillin, Law of Municiple Corporations § 30.32 (3d ed. 1990). 39 AMJUR.2D *Highways, Streets, & Bridges* 182-83 (1999) (citations omitted).

[9] The government's intent has relevance in determining whether it has created a designated public forum. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). By contrast, "traditional public for a open for expressive activity regardless of the government's intent." *Arkansas Educational Television Commission v. Forbes,* 523 U.S. 666, 678 (1998).

Here, there has been no fundamental alteration in "the objective physical characteristics or uses of the property." To the contrary, the streets and sidewalks continue to serve as a pedestrian and vehicle throughway for the members of the community and the surrounding neighborhood. They remain part of the neighborhood transportation grid and are easily accessible to the general public. Their basic configuration and appearance are unchanged. To the extent the streets provide access to RRHA buildings, the former "public streets" did the same. The absence of fences or gates that distinguish gated communities from other residential neighborhoods is also telling. *See Lee*, 505 U.S. at 698-99 (Kennedy, J., concurring in judgment) (whether property shares physical similarities with traditional public forums is one of the most important factors in defining public fora.)

Residents who once freely drove or walked along Bethel or Sussex streets when they were owned by the City continue to do so. So do their guests and the public in general unless they are unfortunate enough to be stopped by a policeman and cannot establish they have legitimate reasons to be in the neighborhood. Moreover, as in other neighborhoods, the streets in Whitcomb Court are not simply conduits. They are places where friends and neighbors gather and where children play. We know from the record that First Amendment activity continues to be allowed largely unregulated – especially by people who are church affiliated and people distributing literature. J.A. 37-38. This is also an important consideration in the Court's cases.[10]

[10] *See e.g. Lee* 505 U.S. at 698-99 (Kennedy, J., concurring) ("If the objective physical characteristics of the property and the actual public access and uses that have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses, the property is a public forum.") *Lee* 505 U.S. at 698-99 (Kennedy, J., concurring); *Id.* at 686 (O'Connor, J., concurring) (In assessing the property for First Amendment purposes, the question is whether

The only thing that has changed in function is that people who are targeted for exclusion can be arrested for trespass for the very same conduct that was previously beyond the reach of the law.

The Commonwealth contends that not all walkways are sidewalks and that the sidewalks here are more similar to the walkways at issue in *United States v. Kokinda,* 497 U.S. 720 (1990). Its reliance on *Kokinda* is misplaced. In *Kokinda*, the Court held that the sidewalks leading to a post office were not public fora because they led only from the post office parking lot to the post office building, and their sole purpose was to provide ingress and egress to the post office. *Id.* at 727 (plurality opinion of O'Connor, J.) ("[t]he postal sidewalk at issues does not have the characteristics of public sidewalks" because it is not a "public passageway" or "thoroughfare" but "leads only from the parking area to the front door of the post office....[and] was constructed solely to provide for the passage of individuals engaged in postal business."). Here, however, the purpose of the sidewalks is not limited to ingress and egress to Housing Authority buildings. Rather, they function more generally for pedestrian passage and enjoyment, and are thus indistinguishable from those sidewalks that have been held to be public fora. *See Frisby v. Schultz*

The purported closure of these streets and the adoption of a No Trespass policy is nothing more than a thinly veiled attempt to extinguish the public forum status of the property. The Court should reject this dangerous and far reaching assault on public forum doctrine. "As society becomes more insular in character, it becomes essential to protect public places where traditional modes of speech and expression can take place." *Kokinda* 497 U.S. at 737

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expressive activity is compatible with the purposes and uses to which the government has lawfully dedicated the property, not whether government has designated speech as the purpose of the property).

(Kennedy, J., concurring in judgment). At the heart of public forum analysis lies the principle that in a free nation citizens must have the right to gather and speak with other citizens in public places. This principle may not be breached by an attempt by government officials to establish and preserve a particular type of residential atmosphere, whether using the pretext of maintaining that atmosphere, as in *Frisby*, or combating crime, as here. *See Watchtower Bible and Tract Society v. Village of Stratton*, 536 U.S. 150 (2002) (discussing how the threat of burglars is often advanced in the Court's canvassing cases). On these facts, the Housing Authority has no greater right to exercise dominion over these streets than the City of Richmond itself did when title to the streets rested with it.

II. THE RRHA TRESPASS POLICY ARBITRARILY EXCLUDES INDIVIDUALS FROM TRADITIONAL PUBLIC FORA IN VIOLATION OF THE DUE PROCESS CLAUSE

A. The Challenged Policy Violates the Right to Travel Freely On the Public Streets.

Although the Supreme Court has not expressly recognized a fundamental right to move at will on the streets and sidewalks in the city where one resides. Justice Stevens , joined by Justice Souter and Justice Ginsburg, observed:

> [I]t is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is "a part of our heritage" *Kent v. Dulles,* 357 U.S. 116, 126, 78 S.Ct. 1113, 2 L.Ed.2d 1204 (1958), or the right to move "to whatsoever place one's own inclination may direct" identified in Blackstone's Commentaries. 1 W.

Blackstone, Commentaries on the Laws of England 130 (1765).

City of Chicago v. Morales, 527 U.S. at 54; *see also Kolender v. Lawson*, 4621 U.S. 352, 358 (1983) (noting that anti-loitering statute, which required individuals to provide "credible and reliable" identification "implicated consideration of the constitutional right to freedom of movement"); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972) (describing walking, loitering, and wandering as "historically part of the amenities of life as we have known them"). Over one hundred years ago, the Court noted "the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any state is a right secured by the 14th Amendment and by other provisions of the Constitution." *Williams v. Fears*, 179 U.S. 270, 274 (1900). *See also Civil Rights Cases*, 109 U.S. 3, 39 (1883) (Harlan, J., dissenting) (stating that the right to use public highways is "fundamental in the state of freedom, established in this country. . .") *See also Johnson v. City of Cincinati*, 310 F. 3d. 484, 495-501 (6th Cir. 2002) (canvassing the solid historical foundation for the right to move freely on the city's streets and sidewalks).

The right to move freely on the public streets is implicit in the Court's many cases involving local ordinances targeting loitering in public places. *See Morales, supra; Papachristou, supra.* While these cases typically turn on considerations of vagueness, they recognize the difficulty of crafting an ordinance that attempts to criminalize conduct that involves nothing more than peacefully and unobtrusively using the public streets. The right to move freely is also implicit in the Court's many public forum cases involving situations where the plaintiff or defendant is doing nothing more than standing on a street

corner distributing literature, gathering signatures, or speaking to people who stop to listen, *e.g., Cantwell v. Connecticut*, 310 U.S. 296 (1940), and in its cases involving the use of the streets for picketing and protest marches, *e.g. Shuttlesworth v. Birmingham*, 394 U.S. 147. Streets and sidewalks cannot retain their traditional function of "assembly, communicating thoughts between citizens, and discussing public questions," *Hague v. CIO*, 307 U.S. at 515-16, if individuals may be arbitrarily be excluded from them.[11]

The RRHA policy directly abridges this basic right. For those who have been banned, the right to move freely in certain public places has simply been eliminated. In our view, this is sufficient to render the policy facially unconstitutional.[12] As in *Morales*, however, "[t]here is no need . . . to decide whether the impact of the [RRHA policy] on constitutionally protected liberty alone would suffice to support a conviction," because the policy is also void for vagueness.

B. The Policy is Void for Vagueness

The RRHA trespass policy allows police to ban any person from public streets and sidewalks if he cannot demonstrate a "legitimate business or social purpose" without explaining what constitutes "legitimate business." This Court has repeatedly found similar language to be unconstitutionally vague, and it should do so here as well. "Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of

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[11] This proposition is not contested by the Petitioner or the United States. *See* note 6, *supra*.

[12] In *Johnson v. City of Cincinnati*, the 6th Circuit invalidated an ordinance that prohibited persons convicted of drug crimes from entering certain parts of the city on the grounds that it abridged the constitutionally protected right to travel locally through public spaces and roadways. 310 F.3d. at 494-498.

notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *Morales*, 527 U.S. at 56 (*citing Kolender v. Lawson,* 461 U.S. at 357). The RRHA trespass policy fails on both counts.

This Court has rightly condemned laws that allow police to decide based on their own hunches and biases who should be allowed at large in a public place. Most recently, in *Morales*, the Court invalidated an ordinance that allowed police to order a group in a public place to disperse if the group included a street gang member and the group was "remain[ing] in any one place with no apparent purpose." Failure to obey the dispersal order resulted in arrest. The ordinance was unconstitutionally vague because it failed to "establish minimal guidelines to govern law enforcement." 527 U.S. at 60 (quoting *Kolender v. Lawson,* 461 U.S. at 358). Specifically, the phrase "no apparent purpose" allowed the police to make unconstrained judgments about whether a purpose was "apparent."

The *Morales* holding had ample precedent. In *Papachristou v. City of Jacksonville*, *supra*, the Court invalidated an ordinance that prohibited, among other things, "wandering or strolling around from place to place without any lawful purpose or object." 405 U.S. at 156 n. 1. The Court struck the ordinance down as void for vagueness, both because it "fail[ed] to give a person of ordinary intelligence fair notice that his contemplated conduct was forbidden ... and because it encourage[d] arbitrary and erratic arrests and convictions." *Id.* at 162 (citations omitted). The "restriction" that the wandering or strolling had to be "without any lawful purpose or object" did nothing to cure the ordinance's inherent vagueness but rather set "a trap for innocent acts." *Id.* at 164.

Similarly, in *Palmer v. City of Euclid*, 402 U.S. 544, 545 (1971), the Court considered an ordinance penalizing "any person who wanders about the streets or other public ways or who is found abroad at late or unusual hours in the night without any visible or lawful business...." This ordinance was deemed "vague and lacking ascertainable standards of guilt." *Id.* at 545. *See also Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965) (ordinance forbidding "any person to stand or loiter upon any street or sidewalk ... after having been requested by any police officer to move on" did "not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat." *Id.* (quoting *Cox v. Louisiana*, 379 U.S. 536, 579 (1965) (separate opinion of Black, J.); *Thornhill v. Alabama*, 310 U.S. 88, 100 (1940) (in an anti-loitering and anti-picketing statute, the qualification " 'without just cause or legal excuse' does not in any effective manner restrict the breadth of the regulation," because "the words themselves have no ascertainable meaning either inherent or historical").

The present case falls squarely within this line of precedents. Like the ordinances in those cases, the RRHA policy is designed to prevent crime by allowing police simply to get rid of individuals they deem suspicious. To be banned from RRHA streets and sidewalks, a person need not engage in or even threaten misconduct. It is enough that the police do not like the look of him. The "limitation" that only people with "no legitimate business or social purpose" may be banned is meaningless. That phrase is no clearer than "without just cause or legal excuse," "without any visible or lawful business," "without any lawful purpose or object," or "no apparent reason."

The RRHA trespass policy is also defective under this line of authority because it does not provide any meaningful standard to which persons may conform their

conduct. *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (ordinance prohibiting "three or more persons to assemble ... on any of the sidewalks, street corners ... and there conduct themselves in a manner annoying to persons passing by" held unconstitutionally vague because "it subjects the exercise of the right to assembly to an unascertainable standard"); *Papachristou*, 405 U.S. at 162 (vagrancy ordinance held void for vagueness because "it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute'") (citation omitted). A prohibition on being in a public place with "no legitimate business or social purpose" does not allow people of ordinary intelligence to comply with its requirement, because no person can predict which lawful conduct will be perceived as "legitimate" by any particular police officer.

It is true that in some cases, a person is not arrested for criminal trespass until after he has been warned or received a barment letter. This is not the practice in all cases, however; the evidence shows that the police have complete discretion to make arrests. *See* note 5 *supra*. Even so, the trespass policy is analogous to the loitering ordinance in *Morales*. Under that ordinance, a person could not be arrested without first being ordered, and refusing, to leave the area. But, as a plurality of the Court explained, such "notice" did not render the statute constitutional.

> Although it is true that a loiterer is not subject to criminal sanctions unless he or she disobeys a dispersal order, the loitering is the conduct that the ordinance is designed to prohibit.. . . .If the police are able to decide arbitrarily which members of the public they will order to disperse, then the Chicago ordinance becomes indistinguishable from the law we held invalid in *Shuttlesworth*. Because an officer may issue an order only after prohibited conduct has already occurred, it cannot provide the kind of advance notice that will protect the putative loiterer from being ordered to disperse.

Morales, 527 U.S. at 58-59. The same rule applies here. The police may decide arbitrarily whom they will ban from RRHA property, and there is no advance notice that protects one from being banned. By the time the banning order is issued, it is too late.

Finally, "[t]he most important aspect of the vagueness doctrine is ... the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender*, 461 U.S. at 358 (internal quotation and citation omitted). Where a criminal statute fails to provide such minimal guidelines, it "may permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." Id. (internal quotation and citation omitted). It furnishes a convenient tool for " 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.' " *Papachristou*, 405 U.S. at 170 (quoting *Thornhill v. Alabama*, 310 U.S. at 97-98).

For much the same reasons that the RRHA policy fails to give adequate notice, it also fails to cabin the discretion of law enforcement officers. Since the RRHA policy provides no definition of "legitimate business or social purpose," each particular police officer gets to decide what is "legitimate." "Indeed, because any person standing on the street has a general 'purpose' – even if it is simply to stand – the [policy] permits police officers to choose which purposes are *permissible*." *Morales*, 527 U.S. at 65-66 (O'Connor, J., concurring) (emphasis in original).

The manifest intent of this open-ended discretion is to cast a wide enough net to encompass virtually any non-resident appearing on RRHA property, and then let the

police decide which individuals are unsavory enough to ban. Such a preemptive approach to law enforcement is inconsistent with our justice system's insistence on a presumption of innocence.

III. EVEN WHEN THE HOUSING AUTHORITY ACTS IN ITS PROPRIETARY CAPACITY, ITS TRESPASS POLICY IS UNREASONABLE BECAUSE IT ARBITRARILY PREVENTS HICKS AND OTHERS FROM ENGAGING IN THE FUNDAMENTAL RIGHT OF INTIMATE ASSOCIATION

A. The Constitution Clearly Protects Hicks' Right of Intimate Association from Undue Intrusion by the Housing Authority

The Court has "long recognized that because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Roberts v. United States Jaycees*, 468 U.S. 609, 618-19 (1984) (citing *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). While not identifying precisely the range of relationships protected by the right of intimate association, this Court has, from time to time, noted several "personal affiliations" worthy of constitutional protection. *Id.* at 619. This protected family sphere includes, at a minimum, marriage, *Zablocki v. Rehail*, 434 U.S. 374 (1978); childbirth, *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); the raising and education of children, *Smith v. Oranization of Foster Families*, 431 U.S. 816 (1977); and the choice of living arrangements among relatives, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). As the Court noted in *Roberts*,

> [f]amily relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one share not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.... As a general matter, *only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.*

468 U.S. at 620 (emphasis added).

Here, Hicks' constitutionally protected intimate relationships are clearly implicated because Hicks' mother, his baby and his baby's mother all live at Whitcomb Court. When officer Laino issued Hicks a citation for trespassing at Whitcomb Court on January 20, 1999, Hicks was on the Housing Authority's property to bring "Pampers to his baby." His repeated efforts to have his barment lifted and to visit his children without risk of arrest have been rejected without explanation. The impact on respondent's "highly personal relationships," *Roberts*, 468 U.S. at 618, is clear and substantial.

B. The Housing Authority's "No Trespass" Policy Unreasonably Interferes With Intimate Family Associations

In non-public fora, such as airports, courthouses, and other municipal, state, or federal buildings, the government admittedly has broader discretion to regulate asserted constitutional rights. Unlike a private property owner, however, the government's actions are not completely untethered from constitutional limitations. "[E]ven when acting in its proprietary capacity, [the government] does not enjoy absolute freedom from First Amendment constraints."

Kokinda, 497 U.S. at 725; *cf. Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574-75 (1987) (striking down a regulation prohibiting all First Amendment activities in the Los Angeles International Airport because such a ban cannot be justified by any conceivable government interest). Its regulations must not be based on viewpoint and must be reasonable in light of the purposes of the government forum. *Perry*, 460 U.S. at 45.

In *Lee*, the Court held that an airport terminal was not a public forum. 505 U.S. at 680. Applying the reasonableness standard appropriate for non-public fora, the Court concluded that airport officials could not ban the distribution of literature inside the terminal. Justice O'Connor's concurring opinion summarized the relevant inquiry for determining the reasonableness of a restriction:

> The reasonableness of the Government's restriction [on speech in a nonpublic forum] must be assessed in light of the purpose of the forum and all the surrounding circumstances." *Cornelius, supra,* 473 U.S. at 809, 105 S.Ct., at 3453. "'[C]onsideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved.'" *Kokinda, supra,* 497 U.S. at 732, 110 S.Ct., at 3122, quoting *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 650-651, 101 S.Ct. 2559, 2566, 69 L.Ed.2d 298 (1981).

Lee, 505 U.S. at 687.

Here, too, the reasonableness of the government's actions in this case cannot be considered in a vacuum but

must be assessed "in light of . . . all the surrounding circumstances." The State has never asserted a significant interest in barring respondent from visiting his children.[13] Nor has it ever articulated why respondent's past conduct justifies a potential lifetime ban from Whitcomb Court. Indeed, the State apparently regarded respondent's past conduct as so irrelevant to the issues before the Court that it did not bother to explain the reason that respondent had been banned from the premises. That cavalier attitude is revealing. In petitioner's view, the State need not explain why respondent was barred from visiting his family because, in its view, the government acting as landlord can exclude respondent from its property for any reason or no reason. J.A. 13.

Even at common law, "the landlord may not prevent invitees or licensees of the tenant from entering the tenant's premises by passing through the common area. Moreover, the law is clear that an invitee or licensee who does so, even after a specific prohibition by the landlord, is not a trespasser and does not violate a criminal trespass statute." *State v. Dixon*, 725 A.2d 920, 922 (Vt. 1999); *see also Gordon County Broad. Co. v. Chitwood*, 87 S.E.2d 78, 79 (Ga. 1955); *Konick v. Champneys*, 183 P. 75, 77 (Wash. 1919); *Central Bus. Coll. Co. v. Rutherford*, 107 P. 279, 280-81 (Colo. 1910); *Arbee v. Collins*, 463 S.E.2d 922, 925 (Ga. Ct. App. 1995); *State v. Schaffel*, 229 A.2d 552, 562 (Conn. Cir. Ct. 1966). When the state interferes with a father's right to visit his children, it surely must show more than the state has shown on this record.

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[13] While the challenged policy on its face does not and could not prevent all family visits, it allows RRHA officials to target individuals who they do no want on the premises and prevent them from visiting with family and friends. Because of the "no trespass" policy in force at Whitcomb Court, respondent has been sentenced to jail for doing nothing more than visiting his family.

This is not a domestic abuse case where a protective order has issued. Nor does it involve any allegation of drug dealing, weapons charges or other violence. So far as the record reveals, Hicks is guilty of nothing more than being stopped and questioned repeatedly by the police and then arrested and convicted for being present in the neighborhood where his mother and children live. As the RRHA's own policy allowing guests evidences, government landlords have no greater power to interfere with tenant's lawful guests than private landlords. Even if the common law rule is not controlling, RRHA must act reasonably in light of the purposes for which it was established and the asserted interests at stake. *Lee,* 505 U.S. at 687-88. Whitcomb Court is a residential neighborhood that provides housing for hundreds of families. It is laid out on the city grid and seamlessly incorporated into the surrounding neighborhood. The comings and goings of friends and other guests – especially family members – is fundamentally consistent with the RRHA's purpose and mission. While RRHA officials could certainly limit access to uninvited guests, the justification for excluding invited guests is not compatible – rather, it is patently *incompatible* –with the purposes of public housing. *Id.*

CONCLUSION

For the reasons stated herein, the judgment below should be affirmed.

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Dated: April 4, 2003

Supreme Court, U.S.
FILED
APR 4 2003
CLERK

No. 02-0371

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

KEVIN LAMONT HICKS,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF VIRGINIA

BRIEF OF AMICUS CURIAE WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

With the consent of the parties, Watchtower Bible and Tract Society of New York, Inc., submits this brief *amicus curiae* in support of Respondent.[1] The letters of consent are being submitted herewith.

The Watchtower Bible and Tract Society of New York, Inc., is a not-for-profit corporation used by Jehovah's Witnesses to print Bibles and Bible-based literature. There are over six million active Jehovah's Witnesses organized into over 94,600 congregations worldwide. In the United States, more than one million Jehovah's Witnesses worship in over 11,000 congregations. Jehovah's Witnesses consider it part of their individual responsibility before Jehovah God to follow Jesus' example and obey his command to go from house to house to speak to people about the Kingdom of God. As part of their public ministry, individual Jehovah's Witnesses "offer religious literature without cost to anyone interested in reading it." *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, __, 122 S. Ct. 2080, 2083 (2002). From September 2001 to August 2002, Jehovah's Witnesses spent over 184 million hours in their Bible education work in the United States alone. Their public ministry includes visiting residents in public housing. The Court's decision in this case will significantly impact this aspect of Jehovah's Witnesses' ministry.

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1. Pursuant to Supreme Court Rule 37.6, *Amicus* states that no counsel for a party authorized this brief in whole or in part and that no person or entity other than *Amicus*, its members, and its counsel contributed monetarily to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

It is not merely conjecture or speculation to conclude that the ability of Jehovah's Witnesses to share their Bible-based message with public housing residents will be adversely affected if the government's street-privatization scheme is upheld. Experiences from around the country prove that such schemes embolden public housing managers to act as censorial gatekeepers, enforcing 'No Trespassing' regulations against Jehovah's Witnesses who attempt to engage in religious discourse. Should the Court sanction the scheme, discourse that lies at the heart of the First Amendment could lawfully be prohibited at formerly quintessential loci of communications.

The well-established contours of the overbreadth doctrine clearly permit consideration of the impact that the government's street-privatization scheme would have on protected speech. In the face of real and substantial overbreadth, a court need not wait until harm befalls speech interests before considering whether a governmental policy is overly broad in its reach.

The First Amendment was designed as a bulwark against the government's ability to interfere with activities that lie at the heart of liberty. Included within that protected liberty are the freedoms to speak, to distribute literature, and to participate in the open exchange of ideas. Such freedoms are the lifeblood of a free and vibrant democracy. If, by the simple expedient of changing title to property immemorially held in public trust, the government can stop protected communicative activity on residential public streets—the quintessential loci of communication—and thereby strip its citizens of their First Amendment protections, then the government has been accorded a potent weapon, indeed.

ARGUMENT

I. The overbreadth doctrine is applicable because the street-privatization scheme permits protected speech to be muted.

a. The scheme's impact on Jehovah's Witnesses and others' freedom to disseminate information is both real and substantial.

Countrywide over the past few years, Jehovah's Witnesses attempting to engage in their public ministry have experienced interference from managers of public housing facilities. Local congregations of Jehovah's Witnesses have reported difficulties in speaking at public housing facilities from coast to coast: from Kent, Washington, to Trenton, New Jersey. Representative of the nature of the barriers to speech resulting from the 'No Trespassing' scheme is the experience of Jehovah's Witnesses in buildings supervised by the Housing Authority of the City of El Paso, Texas.

There are 59 congregations of Jehovah's Witnesses in and around the city of El Paso. For years the regulations of the Housing Authority of the City of El Paso[2] have prohibited members of those congregations from entering public housing complexes. The United States Court of Appeals for the Fifth Circuit found these regulations to be an unconstitutional burden on prohibited speech. *Vasquez v. Housing Authority of the City of El Paso*, 271 F.3d 198 (5th Cir. 2001), *vacated*

2. The El Paso Housing Authority is the 21st largest housing authority in the United States. *U.S. Dep't of Housing and Urban Development*, "In the Crossfire: The Impact of Gun Violence on Public Housing Communities," App. IV, p. 43 (2000).

and reh'g en banc granted, 289 F.3d 350 (5th Cir. 2002). As a result of the Fifth Circuit's decision, on February 6, 2002, by its counsel, the Housing Authority advised Jehovah's Witnesses that they could conduct their public ministry within El Paso's public housing complexes.

On April 19, 2002, the Fifth Circuit ordered *Vasquez* to be reheard *en banc*. Notice of the death of the appellant was filed on July 22, 2002. Oral argument was heard *en banc* on September 19, 2002. On September 23, 2002, the court of appeals denied the motion to substitute as a party the wife of the deceased remaining appellant (the administratrix of his estate) and dismissed the appeal.[3]

Jehovah's Witnesses attempted to conduct their public ministry in El Paso public housing. However, on December 12, 2002, at Kennedy Apartments (a public housing complex within the Housing Authority of the City of El Paso) they again encountered interference from the housing manager. At the direction of the manager, the police ordered the Witnesses to leave under threat of arrest.

Although anecdotal, the situation in El Paso well illustrates the actual difficulties Jehovah's Witnesses face nationwide in attempting to disseminate information in public housing facilities.

Logically, the street-privatization scheme's reach is not limited to the expressive activities of Jehovah's Witnesses.

3. This order is not published but can be found in the Petition for Certiorari, pages A1-A2, in *De La O v. Housing Authority, petition for cert. filed*, 71 U.S.L.W. 3578 (U.S. Dec. 19, 2002) (No. 02-1276).

Similar trespass schemes around the country have interfered with others' rights of speech and press, as the following examples demonstrate:

> Anthony Mark Daniel was arrested after posting a sign protesting America's involvement in the Persian Gulf War. Thereafter, he was twice arrested for distributing leaflets to Housing Authority residents. *Daniel v. City of Tampa*, 38 F.3d 546, 549 n.5, n.6 (11th Cir. 1994).

> Jesus De La O brought suit to protect "his constitutional right to receive oral and written presentations from political candidates or their representatives." *Vasquez*, 271 F.3d at 201. He was joined in that action by Roberto Vasquez, then a candidate for El Paso County Democratic Chair, who was seeking to distribute literature in a housing authority complex. *Id.* at 200.

Illustrating that residents who desire to receive information really exist is the lawsuit brought by William Walker, a tenant of Georgetown (MA) Housing Authority property. He brought suit to assert the rights of tenants "to receive information, and to determine for themselves whom they will receive as visitors." *Walker v. Georgetown Housing Authority*, 677 N.E.2d 1125, 1126 (Mass. 1997). While Mr. Walker was contesting a total ban on the dissemination of information, and not a 'No Trespassing' policy, his case shows the effect a 'No Trespassing' policy would have if all speakers were prohibited on formerly public streets within Housing Authority complexes.

It is clear that the overbreadth of the street privatization scheme is not only "real, but substantial as well." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Well over 1.7 million individuals reside in public housing. *U.S. Dep't of Housing and Urban Development* (updated January 9, 2002), *available at* www.hud.gov/offices/pih/systems/pic/50058/rcr/index.cfm. This is a population larger than 12 states and the District of Columbia. Further, the scheme could result in a total ban on the dissemination of information on public streets in public housing if all speakers are subject to the 'No Trespassing' policy. This is hardly insubstantial.

The government's policy puts at risk fundamental First Amendment rights, as it impinges the "hand distribution of religious tracts . . . an age-old form of missionary evangelism" on Housing Authority streets. *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, __, 122 S. Ct. 2080, 2087 (2002) *quoting Murdock v. Pennsylvania*, 319 U.S. 105, 109 (1943). It also impinges the "constitutional rights of . . . those desiring to receive" literature. *Martin v. City of Struthers*, 319 U.S. 141, 149 (1943). Further, it eliminates the ability to contact residents of public housing units at their homes by denying access to public vestibules containing apartment buzzers or bells. Many public housing residents may be willing recipients of information. As this Court recognized in *Hill v. Colorado*, 530 U.S. 703 (2000), the protection of speech to a willing audience has a solid foundation. "Private citizens have always retained the power to decide for themselves what they wish to read, and within limits, what oral messages they want to consider." *Id.* at 734. If the government's scheme is upheld, a private citizen residing at Housing Authority property would no longer have the right, let alone the opportunity, to decide for himself whether to receive messages at his home.

b. Mr. Hicks may properly assert the expressive rights of others not before the Court because the scheme creates an impermissible risk of the suppression of ideas.

The government's street-privatization scheme is unconstitutionally overbroad because it restricts a substantial amount of constitutionally protected speech. Under the "overbreadth doctrine," Respondent may assert the interests of others not before the Court—in this instance, those desiring to engage in religious or political discourse.

Although Mr. Hicks did not participate in discourse, he may properly challenge the government's scheme as being unconstitutionally overbroad because it prohibits religious or political discourse absent Housing Authority permission.

> "[T]he transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their right for fear of criminal sanctions provided by a statute susceptible of application to protected expression."

Los Angeles Police Dep't v. United Reporting Publishing Corp., 528 U.S. 32, 38 (1999), *quoting Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972).

"[A] party [may] challenge an ordinance under the overbreadth doctrine in cases where . . . the ordinance sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129-30 (1992). Since Richmond's scheme applies to, and may well deter, individuals who wish to engage in one-on-one religious or political communication on public streets, its existence "may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. at 612 (1973). Further, the risk of prosecution raises the "need to protect such speakers by allowing someone else to raise their challenges to the law." *Los Angeles Police Dep't*, 528 U.S. at 42 (Scalia, J., concurring). To assess the facial invalidity of the policy, Respondent may invoke the overbreadth doctrine. *Los Angeles Police Dep't v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999).

Under the overbreadth doctrine, a party may challenge a policy "in cases where every application creates an impermissible risk of suppression of ideas, such as an ordinance that delegates overly broad discretion to the decisionmaker." *Forsyth County*, 505 U.S. at 129. It is appropriate in an overbreadth challenge to consider the context within which a case arose:

> In evaluating respondent's facial challenge, we must consider the county's authoritative constructions of the ordinance, including its own implementation and interpretation of it. In the present litigation, the county has made clear how it interprets and implements the ordinance.

Id. at 131 (citations omitted).

In like manner, it is appropriate to review the Housing Authority's policy regarding those desiring to engage in the dissemination of information. The Housing Authority has made it clear how it interprets its policy. As implemented and interpreted through the "unwritten policy," the housing manager decides who receives permission to disseminate literature. The scheme impermissibly grants the Housing Authority manager "overly broad licensing discretion." *Forsyth County*, 505 U.S. at 130.

Further, a speaker is subject to arrest if, after "having been duly notified . . . [he] stays upon or returns to Richmond Redevelopment and Housing Authority property." *Virginia v. Hicks*, 563 S.E.2d 674, 676 (Va. 2002). Such notification will be given if a "person cannot demonstrate a legitimate business . . . purpose for being on the premises." *Id.* The determination of legitimacy in the context of dissemination of information is also within the discretion of a police officer. *See Hicks v. Virginia*, 548 S.E.2d 249, 252 (Va. Ct. App. 2000) (*en banc*) ("The police officer makes the determination whether a person is to be barred, determines whether the person is a tenant or is there at the invitation of a tenant, or whether there is a legitimate reason for being on the property.").

If a speaker can get past the legitimacy determination of the police, she is still subject to the unfettered discretion of the housing manager. *Hicks*, 563 S.E.2d at 680-81. The overbreadth doctrine is designed to permit judicial review of such a policy in the face of the "possibility that protected speech will be muted." *Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977).

Virginia contends that Mr. Hicks cannot raise these important issues because he was not involved in expressive conduct. However, this is precisely the situation the overbreadth doctrine is designed to address. It is an exception designed to safeguard the First Amendment interests of those not before the Court. If the rule of law permitted Mr. Hicks to raise overbreadth issues in his defense only if he were personally involved in the dissemination of information, an overly broad law would remain in place despite its obvious, real, and substantial impact on constitutionally protected speech interests.

II. The government has no authority to prohibit the dissemination of ideas by privatizing public residential streets.

The government's privatization scheme is fatally flawed in that it ignores two centuries of zealous First Amendment protection for residential streets—traditional loci of communication.

The 'No Trespassing' scheme attempts to revoke public access to residential streets, fora that hold a special place in American jurisprudence:

> Wherever the title of streets . . . may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United

> States to use the streets . . . for communication of views on national questions may be regulated in the interest of all; . . . but it must not, in the guise of regulation, be abridged or denied.

Hague v. CIO, 307 U.S. 496, 515-16 (1939) (Roberts, J.).

These words of Justice Roberts are not some idealized version of a hoped-for Utopia. Rather, they articulate a principle embedded within the very fibers of First Amendment jurisprudence.

> In short, our decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a "cliché." . . . No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora.

Frisby v. Schultz, 487 U.S. 474, 480-81 (1988). Relying upon the principles enunciated by Justice Roberts in *Hague*, in reference to public streets and sidewalks, the Court has held that "[i]n such places, which occupy a 'special position in terms of First Amendment protection,' the government's ability to restrict expressive activity 'is very limited.'" *Boos v. Barry*, 485 U.S. 312, 318 (1988) (citations omitted).

The government's privatization scheme ignores the special position that residential streets and sidewalks serve as part of the marketplace of ideas. In destroying access to this quintessential public loci, the government theorizes that as a landlord, it can act as it wills with respect to its property. This supposition has no support in law.

This is not the first governmental attempt to regulate activity on residential streets. The city in *Hague* advanced an argument similar to Petitioner's. In *Hague*, the city contended that its

> ownership of streets and parks is as absolute as one's ownership of his home, with consequent power altogether to exclude citizens from the use thereof, or unless, though the city holds the streets in trust for public use, the absolute denial of their use . . . is a valid exercise of police power.

Hague, 307 U.S. at 514. Thereafter, the Court consistently rejected governmental attempts to circumvent the public's right of access to residential streets for expressive purposes. *Schneider v. New Jersey*, 308 U.S. 147 (1939); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Tucker v. Texas*, 326 U.S. 517 (1946); *Frisby v. Schultz*, 487 U.S. 474 (1988).

In support of its proposition that it can act in a different manner as a landlord than it can as a sovereign with respect to residential streets, Petitioner relies mainly on *Department of Housing and Urban Development v. Rucker*, 122 S. Ct. 1230 (2002). While *Rucker* gives the government the authority as landlord to enforce the contractual terms of a lease against its tenants, it surely does not give the government *carte blanche* to regulate the constitutional rights of its tenants, let alone the constitutional rights of third parties.

> The government is not attempting to criminally punish or civilly regulate respondents as members of the general populace. It is instead acting as a landlord of property that it owns, involving a clause in a lease to which respondents have agreed and which Congress has expressly required.

Rucker, 122 S. Ct. at 1236. In the present case, the government attempts to regulate its tenants as though they were members of the general populace as well as individuals who actually are members of the general populace. This it cannot do.

Constitutional jurisprudence does not support the government's privatization scheme. It was impermissible for the city of Macon to appoint private trustees and avoid constitutional safeguards as to the administration of a public park. *Evans v. Newton*, 382 U.S. 296 (1966). It was impermissible for the state of North Carolina to contract with private physicians and avoid its constitutional duty to provide adequate medical treatment to prison inmates. *West v. Atkins*, 487 U.S. 42 (1988). It was impermissible for the federal government to create a private corporation and avoid its constitutional duty to abide by the First Amendment. *Lebron v. Nat'l Railroad Passenger Corp.*, 513 U.S. 374 (1995). Similarly, it must be impermissible for a political subdivision of the Commonwealth of Virginia, the Richmond Redevelopment and Housing Authority, to privatize property held in public trust and avoid its constitutional duty to abide by the First Amendment.

The Court has long protected the public status of streets. "Congress, no more than a suburban township, may not by its own *ipse dixit* destroy the 'public forum' status of streets . . . which have historically been public forums." *U.S. Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 133 (1981). "Nor may the government transform the character of the property by the expedient of including it within the statutory definition

of what might be considered a non-public forum parcel of property." *United States v. Grace*, 461 U.S. 171, 180 (1983). And it is residential streets that is our focus. Contrary to the contention of Petitioner and its *amici*, there is no claim for access to speak in public schools, public libraries, or courthouses. Such are not, and never have been, quintessential loci of communications. Nor is access being sought to disseminate information on military installations, which were never traditional places "for free public assembly and communication of thoughts by private citizens." *Greer v. Spock*, 424 U.S. 828, 838 (1976).

We are not oblivious to the effects of crime on residents of public housing complexes. But the scheme in question does not focus on those committing crimes. *Cf. City of Bremerton v. Widell*, 51 P.3d 733, 735 (Wa. 2002) *en banc* ("This policy allows the revocation of a nonresident's license to be on the common areas of the premises if the nonresident is found engaging in specified criminal and offensive conduct."). Rather, it impermissibly impacts residents who are entitled to decide to receive messages of comfort and hope, and those who wish to enter these complexes to communicate such messages. Here, the scheme draws "no distinction between innocent conduct and conduct calculated to cause harm." *City of Chicago v. Morales*, 527 U.S. 41, 50-51 (1999). It should.

There is no evidence that the government changed the nature of the streets with the intent to thwart expressive activity. Also, logic dictates that it intended (at the time of building the housing units) to create public residential streets. Otherwise, there would be no need for it to "transfer" ownership as part of the street-privatization scheme. In any

event, the issue of its intent is irrelevant in adjudicating the rights of those who wish to disseminate, or receive, information in public housing. "In summary, traditional public fora are open for expressive activity regardless of the government's intent. The objective characteristics of these properties require the government to accommodate private speakers." *Arkansas Educ. Television Comm. v. Forbes*, 523 U.S. 666, 678 (1998).

It is the nature of the streets (residential) that drives the analysis in this case. Individuals who live in residential neighborhoods with white picket fences and green lawns surrounding red-roofed homes have the unfettered rights to receive information whether on the street or at their door. Residents of public housing should not be treated any differently. They, too, should have the right to receive information on their residential streets. Speakers, too, should have the right to ring a resident's buzzer or bell in the public lobby of residential buildings. Those "good, decent people who must struggle to overcome their desperate situation, against all odds, in order to raise their families, earn a living, and remain good citizens" (*City of Chicago v. Morales*, 527 U.S. 41, 115 (Thomas, J., dissenting)) should not be treated as less than full recipients of the rights that lie "at the foundation of free government by free men." *Schneider v. New Jersey*, 308 U.S. at 161 (1939).

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of Virginia should be affirmed.

Respectfully submitted,

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No. 02-371

APR 4 2003

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COMMONWEALTH OF VIRGINIA, PETITIONER

v.

KEVIN LAMONT HICKS, RESPONDENT

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BRIEF FOR AMICI CURIAE RICHMOND TENANTS ORGANIZATION, CHARLOTTESVILLE PUBLIC HOUSING ASSOCIATION OF RESIDENTS, ENPHRONT, & MASSACHUSETTS UNION OF PUBLIC HOUSING TENANTS IN SUPPORT OF RESPONDENT KEVIN LAMONT HICKS

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INTERESTS OF THE AMICI CURIAE[1]

Amici Curiae are tenant organizations representing public housing residents in communities around the nation. Their members, and the communities in which they reside, are directly affected by trespass prohibitions similar to the one at issue here. Each of these tenant organizations has an interest in ensuring that this Court maintain and enforce clear and

[1] Amici Curiae have obtained the written consent of Petitioner's and Respondent's counsel to file this brief with the Court. The written consents are filed accompanying this brief pursuant to Supreme Court Rule 37.3(a).

Pursuant to Supreme Court Rule 37.6, Amici Curiae note that counsel for Amici wrote the entirety of this brief and that no person or entity, other than the Amici Curiae, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

long-standing laws protecting their members' rights to have guests and other visitors.

Amicus Richmond Tenants Organization (RTO) is a duly incorporated Virginia organization, whose membership consists of all residents of public housing in the City of Richmond, Virginia. RTO, comprised of elected representatives from Richmond Redevelopment and Housing Authority (RRHA) public housing projects, works to promote and further legal, social, and economic rights of all residents of conventional public housing. Through attendance at tenant council meetings, grass-roots lobbying, dissemination of information in the community, and communication with RRHA, the RTO has educated the thousands of individuals it represents about their rights and developments in the public housing field.

Amicus Charlottesville Public Housing Association of Residents (PHAR) is a city-wide resident-run association serving hundreds of public housing residents in Charlottesville, Virginia. Its mission is to empower residents to improve their communities through collective action. PHAR educates public housing residents about issues that affect them, such as residents' rights to have guests, and encourages residents to participate in the shaping of the public housing authority's policies.

Amicus ENPHRONT (Everywhere and Now Public Housing Residents Organizing Nationally Together) is a resident-led organization with members and affiliates in forty-six states, in addition to Puerto Rico and the District of Columbia. ENPHRONT advocates for the preservation, improvement and development of public housing through coordinated local and national action. The organization also works to educate residents about the laws and policies affecting their lives, including those governing the right to invite business and social visitors and guests into their homes.

Amicus Massachusetts Union of Public Housing Tenants (Mass Union), a membership organization including individual public housing residents and local tenant councils, represents thousands of tenants across Massachusetts. It seeks to create, preserve, and advance safe and secure public housing communities through responsible behavior by both tenants and housing authorities. In recent years, many of Mass Union's members have objected to their housing authorities' trespass policies too broadly restricting residents' rights to have guests. Mass Union members believe that while housing authorities should act vigilantly to protect families from crime and violence, they should not unnecessarily infringe upon residents' rights. Recently, Mass Union has undertaken efforts to educate all of its members about their rights to have guests in their homes.

SUMMARY OF ARGUMENT

Trespass prohibition practices such as the one utilized by the Richmond Redevelopment and Housing Authority (RRHA) pose a significant risk of trampling upon the well-established rights of public housing residents to associate with and invite others into their homes. The millions of men, women, and children who, because of their poverty, live in publicly financed residences[2] are not subject to greater infringement of their rights than those who are able to afford private housing. To the contrary, because public housing residents' lack of financial resources significantly reduces their ability to obtain private housing of their choice,[3] it is all

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[2] In 1998, nearly three million people lived in public housing. *See HUD, A Picture of Subsidized Households - 1998. At* http://www.huduser.org/datasets/assthsg.html (last modified Mar. 20, 2003).

[3] Petitioner and Amici in support of Petitioner concede that public housing residents lack the financial resources to obtain different housing. Pet. Br. at 35-36 ("low-income tenants in public housing often have few choices about where they live"); Amici City of Richmond and RRHA Br. at 3 (stating that most residents do not have the "capability to relocate"); *see also* Amicus Criminal Justice Legal Foundation Br. at 3 (stating that residents "must" live in public housing); Amici States Br. at 19 (stating

the more important to defend their rights from encroachment by housing authorities.

Public housing residents' rights to associate with and invite others into their homes are recognized in several bodies of jurisprudence. Federal law and regulations acknowledge and protect public housing residents' right to accommodate guests and visitors in their residences. The common law governing landlord-tenant matters recognizes that a tenant obtains possession of the leased premises and therefore has the right to invite others into her home. Finally, the Constitution protects the right of intimate association and right to have access to information, undergirding public housing residents' rights to interact with persons of their choosing on their leased property.

The RRHA no-trespass policy, and others like it across the country, could have far-reaching and untenable consequences for public housing residents. RRHA's policy authorizes law enforcement to notify unauthorized persons (*i.e.*, nonresidents, non-employees, or persons who cannot demonstrate a "legitimate business or social purpose" for being on the premises) that they are forbidden from returning to the property.[4] J.A. 84. The policy does not adequately explain what a "legitimate" purpose is or how the nonresident can demonstrate such a purpose. Under this broad standard, it is all too likely that law-abiding nonresidents such as family members, friends, clergypersons, health professionals, tenant organizers, legal advocates, and other persons with whom a resident wishes to interact can be banned from the resident's property.

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that public housing residents are "among the most vulnerable in our society").

[4] The determination as to the legitimacy of the person's presence, in the first instance, is left to an individual police officer. In addition, if a person requests permission to come on the property for any reason such as leafleting or to hold a religious meeting, the housing authority manager makes the standardless determination of whether to grant permission or not. J.A. 37-38.

An individual who has been barred from the property, although not for the commission of a crime or other disruptive behavior, can be arrested and convicted of trespass if he enters the property again for a lawful and reasonable purpose such as the invitation of a friend or family member residing on the property.

The RRHA policy does not require that the resident be notified that a person asserting that he is a visitor is attempting to see him or her – not at the initial barring or at any subsequent return to the property resulting in arrest for trespass. Furthermore, the policy does not require that a banned person, or the resident affected by the barment, be notified of any procedure for challenging the banning. Even if the person learns of the established mechanism for challenging his barment, the only way that a person may be removed from banned status is to file a written request with the director of operations of the housing authority who appears to exercise unfettered discretion without the assistance of any written guidelines. J.A. 34-36.

Inarguably, public housing residents should not have to tolerate dangerous and crime-ridden communities. Yet, it would be perverse to pursue the goal of crime prevention to the exclusion of all other rights and interests of public housing residents. The quality of residents' lives is comprised of a multitude of factors, not simply safety. Public housing residents, like those who live in private housing, can and should expect to be safe in their communities *and* to exercise their rights to live a "normal" life.

Amici agree with Respondent that the RRHA no-trespass policy is both vague and overbroad. In addition, the policy is problematic because it unnecessarily and unreasonably encroaches upon residents' rights to have guests and visitors come to their homes. Amici respectfully request that the Court, in deciding the issues presented in this case involving access of a nonresident to public housing, remain cognizant

of the danger that the no-trespass policy poses to residents' rights.

ARGUMENT

I. PUBLIC HOUSING RESIDENTS HAVE THE WELL-ESTABLISHED RIGHT TO INVITE AND RECEIVE GUESTS AND VISITORS INTO THEIR HOMES.

A. FEDERAL STATUTES AND REGULATIONS RECOGNIZE AND PROTECT THE RIGHT OF PUBLIC HOUSING RESIDENTS TO INVITE AND ACCEPT GUESTS AND VISITORS INTO THEIR DWELLINGS.

Federal law and regulations recognize the right of public housing residents to accommodate their guests and to be free from unreasonable lease conditions and regulations. The United States Housing Act of 1937 established a mechanism to promote the provision of "decent and affordable housing" for low-income families. 42 U.S.C. § 1437(a)(4) (2000). Under the Act, Congress authorizes the U.S. Department of Housing and Urban Development (HUD) to provide various methods of financial assistance to local public housing agencies (PHAs) for the construction and operation of low-income housing. *See* 42 U.S.C. §§ 1437 to 1437bbb-9 (2000). Local PHAs that are responsible for administering the federally financed housing projects are subject to extensive statutory and regulatory requirements governing virtually every aspect of public housing. Of particular importance to the case now before this Court, PHAs are required to acknowledge that residents have the right to reasonably accommodate guests and visitors in their homes. 24 C.F.R. § 966.4(d) (2002). Federal law also mandates that PHAs cannot subject tenants to unreasonable terms and conditions in their leases, 42 U.S.C. § 1437d(*l*) (2000), or require them to abide by PHA regulations that are not necessary and reasonable. 24 C.F.R. § 966.4(f). No-trespass policies that work in

reality to bar invited guests and other visitors who have done nothing to warrant exclusion from the premises violate these protected rights.

Federal regulations mandate that a public housing "lease shall provide that the tenant shall have the right to exclusive use and occupancy of the leased unit by the members of the household authorized to reside in the unit in accordance with the lease, including *reasonable accommodation of their guests*." 24 C.F.R. § 966.4(d)(1) (emphasis added).[5] The right of public housing residents to reasonably accommodate guests in their homes has long been recognized by HUD. Prior to codifying the right, HUD issued a circular and a model lease form to local housing authorities regarding requirements and recommendations to be reflected in tenant dwelling leases for low-rent public housing projects. HUD Circular RHM 7465.8 (Feb. 22, 1971). The circular and the model lease were developed with the intention of improving management-tenant relationships and promoting an "improved housing environment to the advantage of the low-rent housing program, its beneficiaries, and the communities in which such housing is located." *Id.* at 1.[6] The model lease required PHAs to include a provision that the tenant's "reasonable accommodation" of guests and visitors was not excluded.[7] Circular RHM 7465.8, App. 1, at 3. The model

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[5] HUD has the statutorily-granted power to promulgate regulations necessary to implement the federal public housing programs. 42 U.S.C. § 3535(d) (2000).

[6] HUD also issued Circular RHM 7465.9 (Feb. 22, 1971) regarding grievance procedures in low-rent public housing projects. See *City of Omaha v. United States Hous. Auth.*, 468 F.2d 1, 3 (8th Cir. 1972) for brief discussion of background leading up to the issuance of these circulars.

[7] The provision in the Model Lease provided as follows:

> OCCUPANCY OF THE DWELLING UNIT. Tenant agrees not to assign this lease, not to sublet or transfer possession of the premises; nor to give accommodation to boarders or lodgers without the written consent of Management. Tenant further agrees not to use or per-

lease requirement for reasonable accommodation of guests later became a federal regulatory mandate.[8] One of the "central aspects of the subsidized tenancy,"[9] the requirement has remained a constant protection for public housing residents.[10] Additional federal regulations further demonstrate HUD's recognition of a tenant's right to have visitors and guests. *See* 24 C.F.R. § 966.4(f)(10) (requiring lease provision that tenant is responsible for damages to dwelling or project caused by the tenant, a member of the household, or a *guest*); 24 C.F.R. § 966.4(f)(11) (requiring lease provision that tenant, a household member, or a *guest* should act in manner that does not disturb other residents' peaceful enjoyment and will be conducive to maintaining the project in a decent, safe, and sanitary condition); 24 C.F.R. § 966.4(f)(12) (requiring

> mit the use of the dwelling unit for any purpose other than as a private dwelling unit solely for the Tenant and his family and/or dependents. *This provision does not exclude reasonable accommodation of tenant's guests or visitors.* Tenant agrees to abide by such necessary and reasonable regulations as may be promulgated by Management for the benefit and well being of the housing project and the tenants.

HUD Circular RHM 7465.8, App. 1 at 3 (emphasis added).

[8] *See* Lease and Grievance Procedures, 40 Fed. Reg. 33,402, 33,404 (Aug. 7, 1975).

[9] Tenancy and Administrative Grievance Procedure for Public Housing, 53 Fed. Reg. 33,216, 33,220 (Aug. 30, 1988).

[10] Remarkably, in 1982, when HUD attempted to dismantle many of its regulations affording protections to public housing tenants, it did not seek to eliminate the regulatory acknowledgement of their right to reasonably accommodate guests. *See* Lease Requirements, Eviction, and Hearings, 47 Fed. Reg. 55,689 (proposed Dec. 13, 1982) (proposing, *inter alia*, to limit grievance procedures available to tenants). Congress blocked HUD's deregulatory efforts by passing the Housing and Urban-Rural Recovery Act of 1983, Pub L. No. 98-181, § 204, 97 Stat. 1153 (adding statutory provisions to U.S. Housing Act of 1937 to require, *inter alia*, that HUD develop regulations requiring PHAs to establish and implement administrative grievance procedures and that PHAs shall utilize leases that "do not contain unreasonable terms and conditions").

lease provision prohibiting tenant, household member, *guest*, or "*other person under the tenant's control*" from engaging in certain criminal activities) (emphasis added).

Lower courts that have considered the effect of section 966.4(d)(1) on policies affecting residents' right to have visitors have agreed that it "substantively prohibits public housing authorities from unreasonably interfering with tenants' ability to entertain guests in the tenants' public housing apartments." *Diggs v. Hous. Auth. of Frederick*, 67 F. Supp. 2d 522, 532 (D. Md. 1999); *see also Thompson v. Ashe*, 250 F.3d 399, 409 (6th Cir. 2001) ("Federal law requires reasonable accommodation of guests in public housing.");[11] *Lancor v. Lebanon Hous. Auth.*, 760 F.2d 361, 363 (1st Cir. 1985) (holding that a policy requiring public housing residents to obtain written permission from housing authority management for overnight guests does not provide for the reasonable accommodation of a tenant's guests or visitors).

In *Diggs*, the federal district court considered the legitimacy of a public housing no-trespass policy similar to the RHHA practice at issue here. In that case, persons believed to be on the public housing authority property with "no apparent legitimate reason" were issued citations that warned

[11] Although *Thompson* recognized the right of public housing residents to reasonably accommodate their guests, it did not reach the question of whether the policy in question violated tenants' rights because Thompson, arrested for trespass, lacked standing to assert tenants' rights and was not on the property at the invitation of a resident. *Thompson*, 250 F.3d at 409.

In the case now before this Court, Petitioner asserts that Mr. Hicks lacks standing to assert the First Amendment rights of others. As Respondent correctly observes, however, the function of overbreadth standing is precisely to consider the First Amendment rights of third parties. Furthermore, although a criminal case directly involves only the trespass charge brought against a defendant, if the Court overlooks the impact of the policy on public housing residents, it may lead to a decision that substantially undermines those residents' rights. The Court should not decide this case in such a vacuum. Amici submit this brief in order to voice the concerns of residents who are affected by this no-trespass policy.

them that they would be arrested and charged with criminal trespass if they returned. *Diggs*, 67 F. Supp. 2d at 525 (internal quotations omitted). The decision whether to remove the person from the list of persons prohibited from reentering the property was completely discretionary on the part of the housing authority's executive director; there were no written standards or time deadlines to govern her decision. *Id.* at 527. The court granted the resident plaintiffs' request for a preliminary injunction and in doing so, reasoned that the no-trespass policy caused substantial harm to tenants' rights because it operated as a "virtually permanent bar to a tenant's right to invite a guest into her own home, no matter how close a friend or relative that potential guest might be." *Id.* at 533.

In addition to the explicit recognition of public housing residents' rights to have guests and visitors, federal statutory and regulatory provisions more broadly prohibit the imposition of unreasonable lease terms and other requirements upon public housing tenants. The U.S. Housing Act of 1937 prohibits the inclusion of "unreasonable terms and conditions" in public housing leases. 42 U.S.C. § 1437d(*l*)(2).[12] Similarly,

[12] No exhaustive list of prohibited terms and conditions is explicitly identified by the statute or its implementing regulations. Rather, many attempted actions by a housing authority may be considered to be unreasonable. *See* H. R. Rep. No. 98-123, at 36 (accompanying earlier version of Housing and Urban-Rural Recovery Act of 1983 (H.R. 1); the provisions in H.R. 1 that added requirement that leases not contain unreasonable terms and conditions are same as the bill that was ultimately passed by both House and Senate (H.R. 3959), *see* Pub. L. No. 98-181, 97 Stat. 1153) ("The PHA leases must also not contain unreasonable, unfair, or unconscionable provisions, such as requirements that the tenants waive rights granted by state or federal law. Since 1970 HUD has prohibited PHAs from utilizing unfair clauses [such as confession of judgment; distraint clauses; exculpatory clauses; waivers of legal notices, legal proceedings, jury trials, and appeals; and clauses requiring tenants to pay costs regardless of outcome]. The bill requires that those regulatory prohibitions be retained and that HUD prohibit as well any additional clauses which are unreasonable"); *see also* 24 C.F.R. § 966.6 (2002).

federal regulation of PHAs requires a lease provision that tenants' obligations include abiding by regulations that are "necessary and reasonable." 24 C.F.R. § 966.4(f)(4).[13] Under these provisions, the abridgement of public housing residents' right to receive visitors is "patently unreasonable." *Diggs*, 67 F. Supp. 2d at 531 (interpreting section 1437d(*l*)(2)). *See also Thompson*, 250 F.3d at 409 (referencing section 1437d(*l*)(2)); *Lancor*, 760 F.2d at 363 (holding that housing authority requirement that tenants obtain written permission from management for overnight guests was neither necessary nor reasonable as required by section 966.4(f)(4)).

No-trespass policies like the one used by the RHHA unlawfully encroach upon residents' rights to reasonably accommodate guests and other visitors. It is all too likely that the RHHA procedure will have the effect of improperly excluding residents' lawful visitors in the first place and continuing to exclude them solely because of their initial barment. The policy also does not adequately consider or allow for residents' choices or provide proper procedures to remedy unfair or erroneous barments.

Nonresidents who have not committed any crime or engaged in any behavior that would jeopardize the health and/or safety of residents may nevertheless, under the policy, be forbidden from returning to the property if they have not satisfied the vague requirement that they be there for a "legitimate business or social purpose." What comprises a "legitimate purpose" is not set forth in any written policy for the benefit of police, housing authority staff, or residents. *See* J.A. 17-18. Thus, under this broad policy, a clergyperson, nonresident child, or grandparent of a public housing resident

[13] The regulation requires a lease provision obligating the tenant to "abide by necessary and reasonable regulations promulgated by the PHA for the benefit and well-being of the housing project and the tenants which shall be posted in the project office and incorporated by reference in the lease[.]" 24 C.F.R. § 966.4(f)(4).

who visits a resident in response to an express or implied invitation could be banned from the property if unable to satisfy the nearly standardless requirement of legitimacy.

Moreover, the only procedure available to such a banned person to challenge his barment is to submit a written request to the director of operations of the housing authority, but there is apparently no notice given by the law enforcement officer issuing the barment notice that this is the required procedure. The record does not demonstrate that there are any guidelines or time deadlines that bind the director's decision. J.A. 34-35. Thus, although Mr. Hicks apparently twice asked to be removed from the banned list, J.A. 40, his requests were refused, with no apparent explanation, and there is nothing in the record to indicate that he was ever told that he had to make his requests in writing.

If the circumstances of the original barment are flawed as described above, a significant and lasting invasion of the rights of public housing residents can ensue, despite the stated intention to preserve the right of residents to visit with "legitimate" guests set forth in the pamphlet issued to residents when the streets were privatized in 1997. J.A. 87.[14] If a banned person returns to the public housing property to visit a friend or relative that lives there, he or she will be arrested for trespass. A lawful and otherwise suitable visitor who has previously been forbidden from returning to the property can be subject to arrest for trespassing without regard to the purpose of his visit. Even a person who is invited onto the property is prohibited from doing so if he was previously banned. J.A. 42. As in the case of Mr. Hicks, a nonresident parent who seeks to provide care and nurture to his infant child will also be subject to arrest if he returns to the

[14] While the policy appears to protect the rights of residents to have guests, in practice, it is too vague to do so. Note, for example, that Kevin Hicks had relatives in Whitcomb Court but the record does not reflect the circumstances under which he was *first* told that he was not permitted to return to the property.

property if previously found to be there without a "legitimate reason." Residents risk their own tenancy if they invite a banned person to their property, even if the person is a close family member and/or the invitation is inadvertently given without knowledge that a person has been banned. J.A. 39. The "option" presented by Petitioner that public housing residents can simply meet with friends, family, and other individuals off of their leased property is not a workable solution; rather, it proposes reducing public housing residents to second-class citizens.

Furthermore, resident notification and participation is nonexistent in the RRHA scheme. For example, neither at the initial barment nor at any subsequent arrest does the RRHA no-trespass policy require that a resident be notified that a person is trying to visit with her; thus, the policy never allows the resident to assist in the determination of the nonresident's legitimacy of purpose by vouching for and accepting him as a visitor.[15] In addition, the policy does not require

[15] In addition, there is no evidence in the record to suggest that Whitcomb Court residents have consented to such a no-trespass policy as a condition of their lease. By law, public housing residents are afforded procedural protections before they can be made subject to changed lease provisions or other housing authority regulations. HUD recognizes the "importance of resident involvement in creating a positive living environment and actively participating in the overall mission of public housing." 24 C.F.R. § 964.1 (2002). Before a public housing authority can change provisions in the lease form it uses, it must provide at least thirty days notice to tenants and resident organizations setting forth the proposed changes in the lease. 24 C.F.R. § 966.3 (2002). The PHA must also provide an opportunity for written comments which it is required to consider before adopting any new terms in the lease form. *Id.* Before the lease may be changed, it must be by written agreement of the PHA and the tenant. 24 C.F.R. § 966.4(a)(3).

Apparently, the RRHA policy was also not properly promulgated as a rule with which public housing tenants must comply. In order for a tenant to abide by necessary and reasonable housing authority regulations, a PHA must promulgate the regulations in compliance with procedural requirements to post them in a conspicuous manner. 24 C.F.R. § 966.4(d)(4); 24 C.F.R. § 966.5 (2002). In addition, if the PHA modifies

that a resident receive notice that a guest has been banned or provide a procedure by which the resident can challenge the prohibition.

No-trespass policies like the one in this case unreasonably deprive residents of the right to accommodate persons with whom they choose to interact in their own dwellings. This is so because standardless policies can far too easily result in erroneous banning, and procedureless policies can far too easily result in trespass convictions. Certainly, in its efforts to protect public housing residents from crime in their community, RHHA could not have intended that public housing residents needed to be protected from persons whose sole criminal act was that of trespass when they returned to the property to visit a resident. In this regard, the housing authority has created the crime and the criminal.

B. UNDER THE COMMON LAW, TENANTS HAVE THE RIGHT TO INVITE AND RECEIVE GUESTS AND VISITORS INTO THEIR LEASED DWELLINGS.

1. Tenants in possession of leased property have the authority to invite persons on the property.

It is with good reason that federal law concerning public housing protects and preserves the rights of residents to accommodate their guests. Under long-standing common law

rules and regulations, it must give at least thirty days written notice to each affected tenant and provide an opportunity for the tenant(s) to present written comments which must be taken into consideration by the PHA before making the proposed modification effective. 24 C.F.R. § 966.5. The housing authority manager testified that the pamphlet distributed to residents when the streets were privatized was not a policy, rule, or regulation. J.A. 17, 22. The only other writing concerning the "policy" was a written authorization given to law enforcement to ban persons with no "legitimate purpose" to be on the property and to arrest them if they return. J.A. 17-18. Thus, RRHA failed to recognize its obligation to give residents notice and an opportunity to comment before instituting the new rule reflected in these documents.

in virtually every jurisdiction in the United States, a tenant obtains legal possession of leased premises and enjoys the rights associated therewith.[16] When a landlord and a tenant enter into a residential lease, possession of the property is transferred to the tenant for a limited period of time in exchange for rent, and the landlord must, at the lease's start, relinquish certain rights. 5 *Thompson on Real Property*, § 40.01, at 5-6, § 40.22(b), at 134 (David A. Thomas ed., 1994). The tenant, during the lease period, should be treated as a purchaser of the property. *Lott v. State*, 132 So. 336, 338 (Miss. 1931).

> Property rights serve human values. They are recognized to that end, and are limited by it. Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises. Their well-being must remain the paramount concern of a system of law.

State v. Shack, 277 A.2d 369, 372 (N.J. 1971) (holding that ownership of real property does not include right to bar access to governmental services available to migrant workers or to visitors of the workers' choice).

At its core, the tenant's legal possession includes the ability to exclude all others from the property, and, in fact, creates a duty to ward off trespassers. 2 *Powell on Real Property*, § 16B.02(2) (Michael Wolf ed., 1995). Conversely, this means that the tenant in possession has the authority to invite people onto the property as he or she so chooses. William Stoebuck et al., *The Law of Property*, § 7.1, at 411 (2000). Unless there is a specific agreement to the contrary, this right

[16] The United States Housing Act of 1937 recognized state "civil and criminal jurisdiction in and over" federally owned public housing projects and explicitly preserved "the civil rights under the State or local law of the inhabitants on such property" Pub. L. No. 75-412, § 13(b), 50 Stat. 888, 895.

is absolute.[17]

> [T]he tenant, when in possession of the demised premises, has the right to invite or permit such persons as the tenant's business interests or pleasure may suggest to come upon the premises, for any lawful purpose, and the landlord has no right to prohibit such persons from coming on the demised premises.

49 Am. Jur. 2d *Landlord and Tenant* § 504 (1995). See also *Commonwealth v. Hood*, 452 N.E.2d 188, 194 (Mass. 1983).

Many state courts have weighed the tenant's possessory interest to invite guests against the landlord's desire to bar the particular guest. They have held that the tenant, as the one in possession of the property, has legal control over who may enter the premises, and this control can be exercised regardless of the landlord's objections. *See* A. W. Gans, Annotation, *Right of Owner of Housing Development or Apartment Houses to Restrict Canvassing, Peddling, Solicitation of Contributions, etc.*, 3 A.L.R.2d 1431 (1949); *State v. Lawson*, 7 S.E. 905 (N.C. 1888) (overturning trespass conviction where jury was improperly instructed that tenant's authority was "subservient" to landlord's) (internal quotations omitted). The tenant enjoys the "final word" on who may come onto the premises. *State v. Schaffel*, 229 A.2d 552, 561 (Conn.

[17] A tenant possessor's right to invite guests could be altered in advance by the lease contract, but only if the tenant agrees to such language. *See e.g., Williams v. Nagel*, 643 N.E.2d 816, 822 (Ill. 1994) (holding that tenant had not extended valid invitation because lease provided that management had the right to bar people from the property). There is no evidence in the record that the RRHA lease contained an agreed upon provision that management is permitted to bar residents' guests and visitors from the property. Even if RRHA had complied with proper procedures to include a lease provision regarding any regulations concerning residents' accommodation of guests and visitors, it could not limit these rights to the extent that its practice does so here. See discussion of federal statutory and regulatory right to reasonable accommodation *supra* Part I.A.

Cir. Ct. 1966) (holding that tenants could invite housing inspectors on property); *see also Hall v. Commonwealth*, 49 S.E.2d 369, 378 (Va. 1948) (commenting that each "householder and not the owner exercises the right to determine whether he will receive the visitor, be he an acquaintance or a stranger"). In some instances, courts have found that landlords have breached the warranty of quiet enjoyment for attempting to interfere with a tenant's ability to invite guests. *See, e.g., Ashley Court Enters. v. Whittaker*, 592 A.2d 1228, 1231 (N.J. Super. Ct. App. Div. 1991); *Branish v. NHP Prop. Mgmt.*, 694 A.2d 1106, 1108 (Pa. Super. Ct. 1997).

All landlords who enter into a lease relationship are subject to these principles, regardless of whether they operate public or private housing. *See L.D.L. v. State*, 569 So.2d 1310, 1312-13 (Fl. Dist. Ct. App. 1990) (reversing criminal trespass conviction where nonresident invited by public housing resident); *In re Jason Allen D.*, 733 A.2d 351, 368 (Md. Ct. Spec. App. 1999) (holding that housing authority has no more or less right to exclude social guest of tenant than does landlord whose tenants are not recipients of a public subsidy); *Messiah Baptist Hous. Dev. Fund v. Rosser*, 400 N.Y.S.2d 306, 308 (N.Y. City Ct. 1977) (holding that subsidized tenants may enjoy residence in manner similar to private tenants).

A nonresident who is invited onto a property by a tenant who lives in a rental property with multiple units must necessarily use common areas to get to the tenant's property. The law is clear that an invitation by a tenant necessarily includes the right to use any common walkways, hallways, or any other methods of ingress or egress in order to get to the tenant's unit and effectuate the invitation.

> [T]hird persons who come upon the-premises at the express or implied invitation of a tenant or whose entry is naturally incident to business carried on by the tenant, have the right, as occasion requires, to make reasonable use of

> the tenant's means of ingress to and egress from the demised premises. . . . The easement which a tenant has for purposes of access to the premises extends to the members of the tenant's family and to guests and invitees.

49 Am. Jur. 2d *Landlord and Tenant* § 629 (1995). Otherwise, an invitation would be meaningless if guests could not use common areas to travel to the tenant's leased premises. *See State v. Schaffel*, 229 A.2d at 562 (holding that inspectors invited by tenants had right to be in common areas); *L.D.L. v. State*, 569 So.2d at 1312 (overturning trespass conviction where defendant was invited by tenant, stating that a "landlord generally does not have the right to deny entry to persons a tenant has invited to come onto his property. This law also applies to the common areas of the premises."); *Lott v. State*, 132 So. at 338 (concluding that rights essential to enjoyment of premises include those of ingress and egress); *Williams v. Lubbering*, 63 A. 90 (N.J. 1906) (holding that visitor, like tenant, entitled to ingress and egress); *Todisco v. Tishman Realty & Constr.*, 62 N.Y.S.2d 458, 459 (N.Y. Sup. Ct. 1946) (holding that invitee has right to use tenant's usual means of ingress and egress); *Commonwealth v. Burford*, 73 A. 1064 (Pa. 1909). This right of non-residents to use common areas has sometimes been conceptualized as an easement or license, *see Commonwealth v. Richardson*, 48 N.E.2d 678, 682 (Mass. 1943), or as joint ownership, *see City of Bremerton v. Widell*, 51 P.3d 733, 738 (Wash. 2002), *cert. denied* 123 S. Ct. 497 (2002).

Under common law principles, public housing residents, like those living in Whitcomb Court, retain the right of exclusive possession of leased premises and, accordingly, the right to invite and receive guests and visitors. Their guests and visitors are further allowed to use the common public and private streets, sidewalks, walkways, and hallways as a

method of ingress and egress.[18]

2. An invitation by a tenant operates as a defense to the criminal charge of trespass.

The overwhelming recognition of invitation as a defense to a charge of criminal trespass further underscores public housing residents' rights to have guests and other visitors in their homes. Criminal trespass statutes arose out of the aforementioned common property law principles. 75 Am. Jur. 2d *Trespass* §§ 162, 165 (1991). Because the purpose of these criminal statutes is to protect the possessor of the property "whether titleholder or not" from unwanted intrusions, an invitation by a tenant in possession provides a defendant with a legal defense to a landlord's charge of criminal trespass: "One who thus comes upon the premises upon the invitation of the tenant, although expressly forbidden to do so by the landlord, is not guilty of a criminal trespass." 49 Am. Jur. 2d *Landlord and Tenant* § 504; *accord* 75 Am. Jur. 2d *Trespass* § 180 (1991). Numerous courts have recognized invitation as a defense. *See e.g., People v. Washington*, 762 N.E.2d 698, 700 (Ill. App. Ct. 2002) (reversing criminal trespass conviction because defendant invited by a resident); *State v. Dixon*, 725 A.2d 920, 922 (Vt. 1999) (reversing criminal trespass conviction because tenant had consented to defendant's presence even though landlord had banned defendant from building); *cf. People v. Rynberk*, 415 N.E.2d 1087, 1091 (Ill. App. Ct. 1980) (observing that tenant's invitee cannot be deemed a trespasser as a matter of law). The defense of tenant invitation is also valid when a trespass is charged for entry onto the common areas. *See Lott v. State*, 132 So. at 337. The tenant invitation defense also applies in cases of nonresidents who are charged with criminal trespass onto public housing authority property. *See In re Jason Allen*

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[18] These common law rights are unrelated to and unaffected by any analysis of whether the streets in Whitcomb Court are a public or nonpublic forum for purposes of the First Amendment.

D., 733 A.2d at 363; *L.D.L. v. State*, 569 So.2d 1310; *cf. Thompson v. Ashe*, 250 F.3d at 405; *Daniel v. City of Tampa*, 38 F.3d 546, 550 (11th Cir. 1994). Once a criminal trespass defendant asserts this defense, the prosecution carries the burden of demonstrating that the defendant had no legitimate reason to be on the property. *See Bean v. United States*, 709 A.2d 85, 86-87 (D.C. 1998); *see also People v. Washington*, 762 N.E.2d at 700-01; *cf. In re Jason Allen D.*, 733 A.2d at 365-66.

In this case, Respondent was charged with criminal trespass for coming to the property even though he told the charging police officer that he was there to get "pampers for his baby." J.A. 55. The Petitioner asserts that the summons was issued because Respondent returned to the property after being issued a permanent barment notice by the landlord RRHA. Pet. Br. at 21. This notice was issued even though there are no facts in evidence that the Respondent engaged in drug-related or dangerous criminal activity that RRHA sought to curb,[19] or that RRHA considered Respondent's relationships with residents. Visiting a tenant who is a relative is certainly a legitimate reason to be on the property. Inconsistent with the civil and criminal law of trespass, the RRHA policy impermissibly fails to recognize invitation as an acceptable reason to be on the property.

C. PUBLIC HOUSING RESIDENTS HAVE CONSTITUTIONALLY PROTECTED RIGHTS TO ASSOCIATE WITH OTHERS IN THEIR HOMES AND

[19] The only criminal conviction attributed to the Respondent other than trespassing is a charge of damaging property, which the state intermediate court found was not related to the RRHA barment notice issued to Mr. Hicks. *Hicks v. Commonwealth,* 548 S.E.2d 249, 252 n.2 (Va. Ct. App. 2001) (*en banc*). In any event, although the record does not reflect why, the Respondent must have already been banned from RRHA property on some earlier occasion, as he had already been convicted of trespassing there earlier. J.A. 66.

TO HAVE ACCESS TO INFORMATION AND IDEAS.

1. The RRHA no-trespass policy infringes upon public housing residents' rights to intimate association.

The right of intimate association recognizes the importance of constitutionally sheltering the choice to enter and maintain certain intimate human relationships free from undue interference from the State "because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984); *see also Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 544-45 (1987).[20] Under Supreme Court jurisprudence, family relationships represent the high end of the continuum of the types of personal bonds deserving of constitutional protection. "Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Roberts*, 468 U.S. at 619-20.

Mr. Hicks' mother, aunt, children and his children's mother live in the public housing complex owned by RRHA. J.A. 70. Certainly, at a minimum, the relationship between a mother and her son and a father and his children exemplify the highly personal relationships that deserve the constitu-

[20] It is not clear whether the right of intimate association has its origins in the First Amendment, substantive due process under the Fourteenth Amendment, or a hybrid of the First and Fourteenth Amendments. *See* Colin O'Connor Udell, *Intimate Association: Resurrecting a Hybrid Right*, 7 Tex. J. Women & L. 231, 233-43 (1998). Although the Court in *Roberts* did not identify the exact constitutional source of the right of intimate association, it left no doubt that the freedom of intimate association is protected as a "'fundamental element of personal liberty.'" *Id.* at 237 (quoting *Roberts v. United States Jaycees*, 468 U.S. at 618).

tional protection recognized in *Roberts*.[21] The RRHA trespass policy, however, bans Mr. Hicks from visiting his mother or his children in their public housing homes and eviscerates the right of public housing residents to decide who they can invite into their homes.

Undeniably, RRHA has an interest in eradicating dangerous criminal activity in public housing. Allowing RRHA to exercise virtually limitless authority to exclude all nonresidents from visiting their family members in their own homes is not the least restrictive or even a reasonable alternative to eliminate the criminal activity on RRHA property. *Cf. McKenna v. Peekskill Hous. Auth.*, 647 F.2d 332 (2nd Cir. 1981) (holding that housing authority's requirement that residents obtain permission for and register overnight guests violates residents' freedom of association under the First Amendment); *State v. Holiday*, 585 N.W.2d 68, 70-71 (Minn. Ct. App. 1998) (concluding that exclusion of nonresident from all housing authority properties "seriously impinges upon the freedom of association of persons such as [nonresident], who testified that he had friends and family living in [housing authority] properties.").[22] Indeed, other options ex-

[21] At the time Mr. Hicks was cited for trespass, he "stated he was bringing pampers to his baby." J.A. 57. At his sentencing he explained, "prior to all the trespass charges that I have, it was due to the fact of me trying my best to take care of my children and make sure that my girl get everything that she needed." J.A. 67. Mr. Hicks' desire to maintain a relationship with his children strikes at the heart of the right of intimate association. Supreme Court jurisprudence has long extended constitutional protection to personal relationships that "attend the creation and sustenance of a family." *Roberts*, 468 U.S. at 619 (citations omitted); *cf. Troxel v. Granville*, 530 U.S. 57 (2000) (holding that substantive due process clause of Fourteenth Amendment protects right of parents to make decisions regarding the care, custody, and control of their children without undue state interference).

[22] The Court's decision in *Department of Hous. and Urban Dev. v. Rucker* is not to the contrary. 122 S. Ct. 1230 (2002). *Rucker* rejected tenants' claims that the housing authority's statutory right to evict tenants for unlawful drug-related activities of others implicated tenants' right of

ist to address illegal activity on the property including intervention by law enforcement to arrest a person who engages in criminal activity and prohibiting persons from returning to the property who have committed certain dangerous criminal activities.[23] Suggesting that Mr. Hicks should arrange to visit his mother and young children at a location other than RRHA property cannot save the trespass policy from its constitutional infirmities. The right of association "is too basic in our constitutional regime to deal with roughshod." *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 543 (1973) (Douglas, J., concurring); *cf. Schneider v. State*, 308 U.S. 147, 163 (1939) ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised some other place").

2. The RRHA no-trespass policy violates residents' First Amendment rights to receive information.

Residents of public housing have the constitutionally protected right to have access to information and ideas offered to them by residents and nonresidents through such mechanisms as campaigning, leafleting, and organizing. "For over 50 years, the Court has invalidated restrictions on door-to-door canvassing and pamphleteering." *Watchtower Bible & Tract Soc. of New York, Inc. v. Village of Stratton*, 122 S. Ct. 2080, 2086 (2002). Correlated with nonresidents' constitutionally protected right to distribute information, residents necessarily have the right to receive it. *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943); *Vasquez v. Hous. Auth. of El Paso*, 271 F.3d 198, 202 (5th Cir. 2001) (holding that the First Amend-

association. 122 S. Ct. at 1236 n.6. Here, however, the policy directly and substantially intrudes upon residents' right to associate with nonresident family members in their public housing homes in order to engage in *lawful* activities. In addition, the residents of Whitcomb Court whose constitutional freedom of association is infringed by the no-trespass policy have not failed to abide by a term of their lease.

[23] See the discussion of alternative guest policies *infra* Part II.

ment guarantee of an unrestricted flow of information into the marketplace of ideas "extends not only to those who contribute to the market place of ideas, but necessarily extends to those who seek to benefit from the resultant dialogue"), *reh'g en banc granted*, 289 F.3d 350 (5th Cir. 2002) and *petition for cert. filed*, 71 U.S.L.W. 3578 (U.S. Dec. 19, 2002) (No. 02-1276). Public housing residents, not PHAs, must be the final arbiter in the decision regarding whether they will receive information and ideas that are offered to them. *See Martin*, 319 U.S. at 147 (holding "each householder" should have "the full right to decide whether he will receive strangers as visitors").

The RRHA no-trespass policy poses a substantial risk of infringing upon the rights of public housing residents to have constitutionally protected access to the marketplace of information and ideas. Under the unwritten policy, the housing authority manager has the unbounded discretion to deny requests by nonresidents to enter the public housing property in order to distribute information to residents or to hold religious services. J.A. 37-38. Residents' First Amendment right to receive information or be exposed to ideas should not be controlled by a government agent's sole discretion. *See Cantwell v. State*, 310 U.S. 296 (1940) (holding statute unconstitutional that required approval of government before soliciting for religious cause door-to-door); *Schneider v. State*, 308 U.S. 147 (holding ordinance unconstitutional that prohibited canvassing, solicitation, or distribution of circulars house-to-house without a permit from chief of police). The housing authority manager's ability to prevent public housing residents from receiving potentially welcomed information on the streets and sidewalks of the property or in residents' own homes violates the First Amendment rights of residents as well as the rights of nonresidents. *See Vasquez*, 271 F.3d 198 (holding that housing authority's policy of completely barring nonresidents from distributing political literature and campaigning on its property was unreasonable); *Walker v.*

Georgetown Hous. Auth., 677 N.E.2d 1125 (Mass. 1997) (holding that prohibition on door-to-door solicitation and campaigning violated First Amendment rights of residents). Such limitless discretion infringes on the rights of public housing residents to make their own decisions whether to receive or reject information regarding political, religious, cultural or other matters of potential interest and importance to their lives, thus isolating them from the broader spectrum of ideas and information.

II. HOUSING AUTHORITIES CAN CREATE POLICIES WHICH PROTECT RESIDENTS' RIGHTS AND CONTRIBUTE TO SAFE COMMUNITIES.

The broad no-trespass policy used by RRHA is not necessary to protect residents from criminal activity in their community. While the public housing tenants submitting this brief are entitled to and desire assistance from housing authorities to control drugs and violence on the property, the standardless policy promulgated by RRHA is unwelcome and unlawful. Public housing tenants sign residential leases as do private tenants, and central to those contracts is the tenant's right to be the full possessor of the premises during the lease term. Public housing residents want safety but do not wish to lose basic rights in the process. The broad discretion sought to be exercised by the Petitioner will too often target nonresidents who are lawful visitors. This unfortunate result is the inevitable consequence of a practice which places too much power in a landlord's hands and ignores a tenant's statutory, common law, and constitutional rights.

RRHA's ability to address crime on the property is not hindered by recognition of a tenant's right to accommodate law-abiding guests and other visitors. *See In re Jason Allen D.*, 733 A.2d at 368 ("our holding does not undermine the Housing Authority's ability to invoke the provisions of [the criminal trespass statute] against persons who trespass on Housing Authority property without a bona fide claim of

right, or who otherwise engage in criminal activity"). Rather, housing authorities and states can simultaneously address critical safety issues on the public housing property, preserve tenants' rights, and ensure fairness.

The first obvious method of crime deterrence is the use of existing criminal prohibition statutes if a resident or nonresident commits a crime on housing authority property.[24] In addition, federal regulations already fully address issues of crime prevention in public housing. For example, a tenant can be held responsible for the criminal and disruptive acts of her household members, guests, and other visitors. *See* 42 U.S.C. § 1437d(*l*)(6); 24 C.F.R. § 966.4(f)(10) – (12); 24 C.F.R. § 966.4(*l*)(5)(vii)(C) (providing that tenant can be required to exclude culpable household member in order to continue residing in housing unit); *see also Department of Hous. and Urban Dev. v. Rucker*, 122 S. Ct. at 1233; *cf.* Va. Code Ann. § 55-248.31:01 (forbidding a landlord from barring a tenant's guest, except where the guest violates the lease or a local, state, or federal law). What distinguishes these existing methods from the RRHA no-trespass policy is that, in situations such as these, the nonresident's conduct violates a proscribed standard. The use of a broad trespass-barment policy such as the RRHA practice is made unnecessary in light of these and other appropriate law enforcement methods.

[24] The use of no-trespass policies to preempt possible criminal behavior that has not yet occurred treads in very dangerous territory. Courts should not be persuaded by the housing authority cry that without trespass barment policies "PHAs must, in their crime control efforts, rely entirely on catching criminal offenders in the act . . . on each and every occasion." Amici Large Public Housing Authorities et al. Br. at 13. Our criminal justice system does not embrace the idea that one can punish a crime before it is committed or even attempted. To proceed otherwise would undermine our current judicial system and turn the operation of public housing properties into science-fiction-like police states.

> The basic legalistic drawback to precrime methodology [is] . . . [w]e're taking in individuals who have broken no law. . . . Happily they *don't* – because we get them first, before they can commit an act of violence. So the commission of the crime itself is absolute metaphysics. We claim they're culpable. They, on the other hand, eternally claim they're innocent. And, in a sense, they *are* innocent.

Philip K. Dick, *The Minority Report, in The Minority Report and Other Classic Stories by Philip K. Dick* 71 (1987) (words of Precrime Commissioner John Anderton).

In order to avoid unnecessary, illegal, and inequitable pitfalls, reasonable housing authority policy governing nonresident entry on property should, at a minimum, be drafted in conjunction with tenant participation.[25] It should also outline the specific conduct that will trigger a notice of barment, provide a method by which residents and nonresidents can challenge such barment and notice of that procedure,[26] provide a periodic review or expiration of each notice, and provide a set of criteria which will result in the barment being lifted. *See e.g., Commonwealth v. Wallace*, 730 N.E.2d 275 (Mass. 2000) (upholding injunction prohibiting non-resident from returning who had committed violent and destructive acts on housing authority property; injunction was obtained through procedure pursuant to statute affording opportunity for trial on merits). Other simple checks could include the housing authority or police confirming a guest's explicit or implicit invitation with the relevant resident prior to issuing any trespass summons or arrest. *See Bean v. United States*, 709 A.2d at 87 (overturning conviction because prosecution presented no evidence that police determined whether defen-

[25] See earlier discussion of importance of tenant participation *supra* n.15.

[26] PHAs are required to notify a tenant of any grounds for a proposed adverse action by the PHA and "afford the tenant the opportunity for a hearing under the PHA grievance procedure." 24 C.F.R. § 966.4(e)(8). *See also* 42 U.S.C. § 1437d(k). Certainly, the prohibition of a resident's guest or visitor and the jeopardizing of a tenant's lease if he accommodates a banned person are adverse actions against a tenant warranting these procedural protections.

dant was with a tenant); *Hall v. Commonwealth*, 49 S.E.2d at 371-72 (concluding that system of announcing visitors to tenants prior to entry allows tenant to make appropriate determinations of who can visit). Safety can be gained without using practices that eviscerate a tenant's full enjoyment of the leased premises.

III. THE COURT NEED NOT AND SHOULD NOT DRAW A DISTINCTION BETWEEN THE HOUSING AUTHORITY AS LANDLORD AND SOVEREIGN.

No justification exists to support the adoption of Petitioner's proposal to create a distinction between the housing authority as landlord and as a sovereign entity, thereby permitting government landlords to act in manners that would otherwise violate the Constitution. Neither *Rucker* nor any other authorities cited by Petitioner countenance such a conclusion.[27]

In *Rucker*, the Court held that section 1437d(*l*)(6) of the U.S. Housing Act "requires lease terms that give local public housing authorities the discretion to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity." 122 S. Ct. at 1238. In response to concerns about due process for residents' property interests, the Court noted that the housing authority was not acting as a sovereign but as a landlord in invoking its right under a statutorily sanctioned lease clause to evict tenants for the drug activity of its household members or guests. 122 S. Ct. at 1236. The discussion of the sovereign issue only served to distinguish that the housing authority's discretion to evict tenants for the drug activity of others was not based on a policy of the housing authority's

[27] Notably, only one of the six amici in support of Petitioner supports this novel proposal. *See* Amici Large Public Housing Authorities Br. at 16. Not even RRHA, the City of Richmond, or the U.S. Solicitor General saw fit to do so.

own design; rather, on this limited issue, like a private landlord, the housing authority's authority to evict arose from a statutorily required lease provision.[28] Unlike *Rucker*, no statute or lease provision permits or requires RRHA to bar residents' guests or other visitors from the housing authority property.[29]

Furthermore, the Court need not answer the question articulated by the Petitioner as to whether the public housing authority acts as landlord or sovereign. In making the determination of whether the conduct occurred in a public or non-public forum for purposes of the First Amendment, the Court assesses the nature of the housing authority's functions and responsibilities toward its residents. This new suggestion adds nothing to the analysis of a government landlord's functions, and the Court should avoid creating a new distinction in a case where it adds nothing to the analysis and the consequences are unforeseeable and potentially devastating to well-established rights of residents. If such a distinction ever must be drawn, this is not the appropriate case or set of circumstances for doing so.

Finally, to the extent that the law should distinguish government as landlord and sovereign, the difference is that public housing tenants have additional substantive and procedural rights arising from the constitutional limitations on the exercise of government power. *E.g., Thorpe v. Hous. Auth. of Durham*, 386 U.S. 670, 678 (1967) (Douglas, J., concurring) (quoting *Rudder v. United States*, 226 F.2d 51, 53 (D.C. Cir. 1955)) ("'The government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law.'").

[28] Amici also agree with Respondent that the distinction in *Rucker* is inapposite here because the RRHA is attempting to broadly regulate the general populace; *i.e.*, nonresidents.

[29] Such a lease provision would be impermissible under the U.S. Housing Act. *See* discussion *supra* Part I.A.

The Court should not fundamentally alter the relationship between PHAs and public housing residents without more careful consideration than this case can allow.

CONCLUSION

Amici respectfully request that this Court affirm the Virginia Supreme Court's reversal of Mr. Hicks' conviction and its determination that the RRHA no-trespass policy is unconstitutional. The important and established statutory, common law, and constitutional rights of public housing residents to accommodate guests and visitors provide further justification for this outcome.

Respectfully submitted,

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(15)

Supreme Court, U.S.
FILED
APR 4 2003
APR 4 2003
CLERK

No. 02-371

In the

Supreme Court of the United States

October Term, 2002

COMMONWEALTH OF VIRGINIA,

PETITIONER,

v.

KEVIN LAMONT HICKS,

RESPONDENT.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

AMICUS CURIAE BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION

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CONSENT TO FILE

Written consent to file in this matter was provided by all parties and is on file with the Clerk of this Court.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Thomas Jefferson Center for the Protection of Free Expression, located in Charlottesville, Virginia, is a nonprofit, nonpartisan organization devoted solely to the protection of free speech and press. The Center has, since its opening in 1990, pursued the mission in various forms, including the filing of *amicus curiae* briefs in both state and federal courts in cases involving a variety of free expression issues.

STATEMENT OF FACTS

This case involves the criminal conviction of respondent, Kevin Lamont Hicks, for trespass in violation of a "barment" notice issued to him by the Richmond, Virginia, Housing Authority. That notice was issued by the Housing Authority's manager, Gloria Rogers, who exercised the unfettered discretion given to her under the Housing Authority Policy. Hicks, who did

not reside in the Whitcomb Court project, was seeking to visit his wife and infant son, who were residents. Hicks had previously been excluded from the project under circumstances that led to issuance of the barment notice.

The City of Richmond enacted an ordinance in 1997 that purported to render streets within the Whitcomb Project "closed to public use and travel" as part of a program to eradicate illegal drug activity. The ordinance attempted to "privatize" the streets in and adjacent to the Housing Authority by deeding those streets directly to the Housing Authority.

Respondent Hicks was charged and convicted of trespass in General District Court. On appeal, the Virginia Court of Appeals reversed the conviction on the grounds that the ordinance abridged citizens' First and Fourteenth Amendment rights to be present at a public place and was not narrowly tailored to serve valid government interests. *Hicks v. Commonwealth of Virginia*, 36 Va. App. 49, 548 S.E.2d 249 (2001). The Virginia Supreme Court affirmed that judgment in substantial part, ruling that the trespass policy was overly broad and finding Hicks a proper party to present such a challenge. *Commonwealth of Virginia v. Hicks*,

264 Va. 48, 563 S.E.2d 674 (2002). The Commonwealth appealed that decision and this Court granted certiorari.

SUMMARY OF ARGUMENT

Four clearly established points should guide the disposition of this case. First, access to government property has been severely restricted by an official policy of the City of Richmond. The property in question is not of the type that is inherently inappropriate for expressive activity; to the contrary, the site includes streets and sidewalks, places which "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939). The fact that such streets lie within a troubled public housing project does not alter the fundamental constitutional interests; indeed, such a location enhances the importance of access, since barring the gates may severely curtail the ability of residents to receive vital information. *Cf. Marsh v. Alabama*, 326 U.S. 501 (1946).

Second, a public official has under state law been given virtually unfettered discretion to limit or condition access to this

public property, in clear violation of such judgments of this Court as *Kunz v. New York*, 340 U.S. 290 (1951) and *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992). The gravity of the departure from this Court's insistence on precision and specificity in limiting access has even been candidly acknowledged by the very official who exercises that authority.

Third, Respondent Hicks is an entirely appropriate person to press such a First Amendment challenge to these policies. He was criminally charged with entering public property in violation of the challenged policies, under circumstances where the directness and immediacy of his interests could hardly be doubted. Whatever may have been the nature of his mission at the time he was denied entry, the issues he seeks to raise here are indistinguishable from those which would be presented by a person who sought access to this site for traditionally expressive purposes.

Fourth and finally, the judgment of the Virginia Supreme Court does not disable government from maintaining order and dealing effectively with such indisputable threats as drug traffic in public housing projects. This Court has very recently provided ample guidance to those who manage public property and who

seek, as they must, to balance the needs of government in administering that property with the historic First Amendment rights of citizens to disseminate and receive information on public premises. *See Thomas v. Chicago Park District*, 534 U.S. 316 (2002).

For these reasons, more fully developed in the arguments that follow, *amicus curiae* respectfully urges affirmance of the judgment below.

I. THE PROPERTY IN ISSUE HERE IS NOT ONLY PUBLIC IN EVERY RESPECT, BUT IS ESPECIALLY SUITED TO EXPRESSIVE ACTIVITY.

The locus of this dispute is, without question, property owned and operated by government. Whatever may have been the agreement between the City of Richmond and the Housing Authority with regard to the ownership, governance, and management of this property, the site has in no degree lost its historically public character. Moreover, the particular property to which access has been denied is the most "public" component of the public housing project – streets and sidewalks where, as this

Court made clear well over sixty years ago, "assembly, communicating thoughts between citizens, and discussing public questions" are clearly appropriate and constitutionally protected activities, *Hague v. CIO*, 307 U.S. 496, 515 (1939). Whatever may be the subtleties and nuances of the later development of the public forum doctrine, *Hague* remains the guidepost for expressive activity on public streets and sidewalks.

Without doubt, certain types of public property are not suited to the full range of expressive activity. The operating room of a city or county hospital comes immediately to mind as an example of publicly owned and managed premises on which protests and demonstrations would not be appropriate. But even here caution is in order. Much the same might be said of the reading room of a public library, where quiet and order are essential to the primary use of that site. Yet as this Court made clear in *Brown v. Louisiana*, 383 U.S. 131 (1966), by reversing the conviction of peaceful and quiet protestors who assembled in the reading room of a public library to challenge racially discriminatory access policies, First Amendment activity may not be totally barred from such a site despite the obvious

incompatibility of some forms of protest with the site's primary use. If a peaceful reading-room sit-in must be tolerated by those who manage a public library, the inclination to place any government property off limits for First Amendment purposes must be approached with great caution.

A public housing project presents an especially compelling case for such caution, however great the need for order and crime control may be. Certain kinds of expressive activity might, for example, interfere unacceptably with the tenants' lives – much as loud shouting and stomping by protestors would thwart the primary use of a public library's reading room. Yet to bar all such activity from a housing project would risk denial of vital information to those very tenants whose interests would be protected by other types of restrictions. If a privately owned company town cannot keep its residents completely in the dark by excluding religious proselytizers, as this Court ruled in *Marsh v. Alabama*, 326 U.S. 501 (1946), surely a government entity which bears a similar relationship to its tenants is comparably constrained. If the indisputably private title to the company town was "not sufficient to justify the State's permitting a corporation to govern a

community of citizens so as to restrict their fundamental liberties," *id.* at 509, surely a government agency that owns and manages a public housing project must be similarly sensitive to the informational interests of its residents.

II. A PUBLIC OFFICIAL MAY NOT EXERCISE UNFETTERED DISCRETION IN GRANTING OR DENYING ACCESS FOR EXPRESSIVE ACTIVITY ON GOVERNMENT PROPERTY.

The record in this case makes unmistakably clear that a public official has been given unfettered discretion to grant or deny access to the public housing project from which respondent was barred. Despite the State's argument that Hicks' arrest arose under the written policies, those policies leave the public official with unfettered discretion to determine whether a given use of the property is legitimate. That discretion has, moreover, been exercised in a manner which reflects its open-endedness and lack of guidance, as the Housing project's manager, Mrs. Rogers, candidly conceded in her testimony. *Hicks*, 264 Va. at 59-60, 563 S.E.2d at 680-81. Indeed, when she testified that she would permit non-residents to distribute material within the project only if she

were "used to seeing" such material, and acknowledged that there were no statutory guidelines governing her decision, the scope and breadth of her discretion became startlingly clear. This unfettered discretion played a major role in the judgment of the court below to invalidate the access policy on First Amendment grounds. *Id.* at 58-60, 563 S.E.2d at 680-81.

At least since *Kunz v. New York*, 340 U.S. 290 (1951), this Court has consistently held that unfettered discretion may not govern the grant or denial of access to public property. Where a statute or "ordinance . . . gives an administrative official discretionary power to control in advance the rights of citizens to speak . . . the ordinance is clearly invalid as a prior restraint on the exercise of First Amendment rights." *Id.* at 293. That view has been often reaffirmed, perhaps most recently in *Forsyth County v. Nationalist Movement*, 505 U.S. at 133, which recognized that "[t]he First Amendment prohibits the vesting of . . . unbridled discretion in a government official." As later cases like *Forsyth County* make clear, not only does a totally standardless policy fail to meet First Amendment strictures; a policy which contains some

standards, but which nonetheless permits official judgments to be based on the content of the speech is equally flawed.

Since, as the court below found, "the Housing Authority has not implemented written procedures or guidelines concerning the enforcement of the trespass policy," the challenged trespass policy is clearly inadequate as applied to those who seek access to the public housing project, whatever their reasons. In analyzing government access policies, no distinction may properly be drawn between property that government regulates or manages in its "sovereign" capacity and property that it administers in its role as "landlord." Whatever variations in the assertion of specific regulatory interests those labels might invite, this Court has never held that vesting unfettered discretion in a public official is compatible with First Amendment standards, regardless of the relationship between government and the specific property. Thus, the Virginia Supreme Court's ruling with respect to the trespass policy should be affirmed on the basis of clearly settled precedent in this Court.

III. RESPONDENT HICKS IS AN APPROPRIATE PERSON TO PRESENT A FIRST AMENDMENT CHALLENGE TO THE POLICY UNDER WHICH HIS ACCESS WAS BARRED.

Before addressing respondent's right to challenge the trespass policy on First Amendment grounds, a threshold issue deserves brief attention. The Commonwealth argued in the courts below that, instead of appealing his criminal conviction for flouting the barment notice he had received from the Housing Authority, respondent's only remedy was to contest the barment notice in a separate proceeding. The Virginia Supreme Court, however, flatly rejected such a claim, ruling as a matter of state law that a challenge through a proceeding such as this one was entirely appropriate. *Hicks*, 264 Va. at 54, 563 S.E.2d at 677. Even the dissenting justices accepted that part of the majority's ruling, making this a unanimous conclusion. *Id.* at 67, 563 S.E.2d at 685. Although the issue is no longer contested in this Court, the clarity with which the Virginia courts have validated this essentially collateral route of challenge to the trespass policy helps to frame the more difficult question of the propriety of the constitutional challenge as such.

Several important factors may guide the resolution of the issue on which the court below was sharply divided. This is not a hypothetical or conjectural dispute. There is not the slightest doubt about the adversity of interests or the clarity of the dispute between the two parties as they come before this Court. Because respondent faces criminal conviction under a statute that may be unconstitutionally broad, this case clearly meets the injury-in-fact requirement for standing. *See, e.g., Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392 (1988). The respondent's potential conviction is a "distinct and palpable injury," *Warth v. Seldin*, 422 U.S. 490, 501 (1975), that obviously has a "traceable causal connection" to the policy in question, *Larson v. Valente*, 456 U.S. 228, 239 (1982). Moreover, the range of constitutional issues that Hicks presses here, and which the courts below fully addressed, are virtually indistinguishable from the interests that a visitor who presented a more conventional expressive claim would raise – for example, one who sought to address the tenants orally or by distributing literature within the housing project. It is also significant that the activity in which respondent was engaged at the time of his arrest –bringing diapers to his infant son inside the

housing project – was not only entirely lawful but was also clearly non-disruptive. Thus, the present case seems an appropriate one in which to reach and decide the merits of an especially important First Amendment issue.

This Court has consistently recognized that a person may challenge a statute as overbroad even though that person's conduct might be reached by a narrower law. Indeed, the Court "has consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity," *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965), a proposition that this Court recently reaffirmed in *Forsyth County*, 505 U.S. at 129.

All that is necessary for such a challenge is "a judicial prediction or assumption that the statute's very existence may cause other parties not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). In other words, this Court has permitted such challenges when there is "a realistic danger that the statute itself will significantly compromise recognized First

Amendment protections of parties not before the Court." *City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). Whatever valid concern there may be for limiting such challenges to situations of "substantial overbreadth" pertains more to adjudicating the merits of a constitutional claim than to the issue of standing; this Court has explained that the substantial overbreadth inquiry is "more properly reserved for the determination of [a] . . . challenge on the merits" than to a party's status as a challenger. *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 948 (1984).

To the extent that demonstration of "substantial overbreadth" is seen as pre-requisite to constitutional challenge, the circumstances of this case leave no doubt that this test has been more than fully met. In its brief, the Commonwealth concedes that the degree to which a statute must reach protected expression before it is deemed "substantial" varies with the circumstances of the case. *Brief of Petitioner* at 18. As noted above, the absence of any standards to guide or constrain the project manager's discretion in granting or denying access, reinforced by her remarkably candid testimony about the eclectic way in which she

administered the trespass policy, graphically demonstrate the unfettered discretion to control both who may speak and what is spoken in Whitcomb Court. Moreover, this control extends beyond the halls, corridors and apartments of the buildings in Whitcomb Court to the streets and sidewalks of the community—areas that this Court has repeatedly stated are important venues for public expression. *E.g., Hague,* 307 U.S. at 515. Further, the Housing Authority's policy intrudes directly on the First Amendment rights of Whitcomb Court residents to receive information. As this Justice Brennan wrote in *Lamont et. al. v. Postmaster General,* "[t]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

In this case, even though the Housing Authority's policy does not explicitly address expression, its impact on the First Amendment rights of both visitors and residents of Whitcomb Court would be little greater even if the policy specifically prohibited expressive activity by all non-residents. As such, and where the constitutional issues are posed after having been fully

canvassed by the courts below, the propriety of review seems beyond doubt.

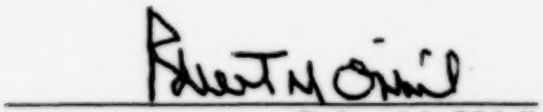
IV. THE JUDGMENT OF THE VIRGINIA SUPREME COURT DOES NOT LEAVE PUBLIC OFFICIALS POWERLESS TO PROTECT GOVERNMENT PROPERTY AND ITS USERS FROM CRIME.

The judgment of the court below properly holds public officials to high standards in shaping rules of access to government property. It does not, however, disable those officials in their mission to protect housing projects and their tenants from criminal activity such as rampant drug traffic. What is needed, and is entirely feasible for those who manage such property, is the degree of precision and sensitivity which this Court recently commended in *Thomas v. Chicago Park District*, 534 U.S. 316 (2002). That judgment sustained a set of clear and specific criteria for the approval or disapproval of applications for the use of municipal park space, coupled with a carefully prescribed and effective process by which to appeal a negative decision. The Court noted, approvingly, that "[n]one of the grounds for denying a permit has anything to do with what a speaker might say." 534 U.S. at 316.

In ruling that the stricter standards imposed by *Freedman v. Maryland*, 380 U.S. 51 (1965), did not apply to such actions, this Court recognized the realities of managing municipal property in a complex modern urban community. Surely those who govern the Richmond Housing Authority are as fully capable as were Chicago's park supervisors of fashioning such precise guidelines, and of applying them in a content-neutral, readily appealable, fashion.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urge this Court to affirm the judgment of the court below.



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April 4, 2003

MOTION FILED
APR 4 2003

(16)

No. 02-371

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
Petitioner,

v.

KEVIN LAMONT HICKS,
Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*, AND BRIEF *AMICUS CURIAE* OF THE DKT LIBERTY PROJECT IN SUPPORT OF RESPONDENT

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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MOTION OF THE LIBERTY PROJECT FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER[1]

The DKT Liberty Project, through its undersigned counsel, respectfully moves this Court, pursuant to Rule 37.2(b) of the Rules of the Supreme Court, for leave to file the accompanying brief *amicus curiae* in support of Respondent, Kevin Lamont Hicks. Petitioner has consented to the submission of this brief, and its letter of consent has been filed with the Clerk of this Court. Counsel for Respondent, Commonwealth of Virginia, has refused to consent to the filing of this brief.

The DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. This not-for-profit organization advocates vigilance over regulation that restricts individual civil liberties. Such restrictions threaten the reservation of power to the citizenry that underlies our constitutional system. The DKT Liberty Project is also particularly involved in defending the right to freedom from government restraint and interference, one of the most profound individual liberties and a critical aspect of every American's right (and responsibility) to function as an autonomous and independent individual.

This case implicates the fundamental right of each citizen to be free from government restraint and interference. It also implicates the ability of citizens to

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[1] Pursuant to Supreme Court rule 37.6, none of the parties authored the brief *amicus curiae* in whole or in part and no one other than *amicus* or its counsel contributed money or services to the preparation or submission of the brief.

measure government restraint against the constitutional yardstick. Because of The DKT Liberty Project's strong interest in protecting citizens from government overreaching, it is well situated to provide this Court with additional insight into the issues presented in this case.

For the foregoing reasons, the DKT Liberty Project respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of Respondent.

Respectfully submitted,

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IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA

Petitioner,

V.

KEVIN LAMONT HICKS,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Virginia

BRIEF OF *AMICUS CURIAE* DKT LIBERTY PROJECT IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The interest of *amicus curiae* is set forth in the foregoing Motion of The DKT Liberty Project for Leave to File Brief *Amicus Curiae* in Support of Respondent.

SUMMARY OF THE ARGUMENT

The Commonwealth of Virginia charged Kevin Hicks with trespassing when he entered the streets adjacent to the Whitcomb Court housing project after he had been denied permission to enter under a policy that vested total and unfettered discretion for such permission in a Housing Authority official. In defending against the trespass charge, Hicks argued that the no-entry without permission policy violated the First Amendment because it was overbroad. Although it never raised the issue in any of the courts below, the Commonwealth now argues to this Court that Hicks did not have standing to raise that defense and it offers a wholly new standing rule untried by any court to date.

Mr. Hicks had standing to raise the overbreadth of the trespass policy in his criminal defense. First, as a state court, the Virginia Supreme Court is not bound by federal constitutional and prudential standing requirements. Further, the standing in this case is a straightforward application of the overbreadth doctrine. Finally, the Commonwealth's proposed "bright-line" rule would allow unconstitutional statutes to chill speech longer and would curtail First Amendment freedoms.

ARGUMENT

I. KEVIN HICKS HAD STANDING TO DEFEND AGAINST A CRIMINAL PROSECUTION ON OVERBREADTH GROUNDS.

The Commonwealth's argument — raised for the first time ever in this proceeding — that Mr. Hicks lacked standing to raise the overbreadth of the policy resulting in his arrest for trespass is misplaced for two reasons. First, the Supreme Court of Virginia has the inherent authority to determine who has standing to raise what issues in courts within the Commonwealth. Second, even if Virginia were required to adhere to federal constitutional and jurisprudential requirements, it did so here.

A. Virginia Courts are Not Bound By Federal Constitutional Standing Considerations.

Under our federalist system, state courts are not bound by federal constitutional or jurisprudential standing requirements and can therefore define their own. This Court has "recognized often that the constraints of Article III do not apply to state courts, and accordingly state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when *they address issues of federal law*." *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (emphasis added) (collecting cases). This Court's federal overbreadth doctrine is an exception to the *federal*

standing rules which do not bind the states.[1] Thus, it is well within a state's inherent authority to provide broader standing to raise a claim than the federal courts might allow.

These principles of comity and federalism have particular force in the context of criminal law, which has traditionally been the province of the states. *Cooper v. Oklahoma*, 517 U.S. 348, 367 (1996); *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995); *Brecht v. Ambramson*, 507 U.S. 619, 635 (1993); *Engle v. Isaac*, 456 U.S. 107, 128 (1982). States have the inherent authority to draft and implement their own criminal codes and procedures for arresting, detaining, and trying suspects, and for imposing significant sentences in cases of conviction. Of course, these laws and procedures cannot violate federal constitutional rights. Consequently, state courts "hold the initial responsibility for vindicating constitutional rights," *Isaac*, 456 U.S. at 128, and a state cannot provide less protection than the constitutional minimum. But if a state provides broader standing to raise constitutional claims than a federal court could, that fact is of no federal constitutional concern. *See State v. Ramos*, 463 U.S. 992, 1013-14 (1983) ("It is elementary that states are free to provide greater protections in their criminal justice system than the federal constitution requires.").

Here, although the Commonwealth never challenged standing, the Virginia Supreme Court clearly considered that

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[1] *See Secretary of State v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956 (1984) (noting that First Amendment justified "lessening of prudential limitations on standing").

Mr. Hicks had standing in Virginia courts to raise the defense that the policy that caused his arrest was overbroad. This result is consistent with a long line of Virginia cases in which criminal defendants have raised challenges that would vindicate the rights of third parties. *E.g., Stanley v. Norfolk*, 237 S.E.2d 799, 801 (Va. 1977) (recognizing that "when overbreadth impinges upon First Amendment guarantees, a person accused under the statute has standing to make a facial attack, even though his own speech or conduct was not constitutionally protected"); *Owens v. Commonwealth*, 179 S.E.2d 477 (Va. 1971) (members of property-damaging crowd arrested under state anti-riot statute had standing to raise overbreadth of statute that prohibited unlawful gatherings); *Perkins v. Commonwealth*, 402 S.E.2d 229, 232 (Va. Ct. App. 1991) (criminal defendant raised overbreadth when charged with threatening to burn a home and using obscene language to intimidate or harass); *Coleman v. City of Richmond*, 364 S.E.2d 239, 242 (Va. Ct. App. 1988) (criminal defendant had standing to raise overbreadth when charged with loitering for purposes of prostitution).

Nor is Virginia unique. Other state courts commonly permit criminal defendants to raise overbreadth claims when the conduct of the criminal defendants was not protected by the First Amendment. For example, the Supreme Court of Washington considered the First Amendment overbreadth claims of two criminal defendants who were prosecuted for trespassing at a public housing project. *City of Bremerton v. Widell*, 51 P.3d 733, 742 (Wash. 2002), *cert. denied*, 123 S. Ct. 497 (2002). Similarly, the Supreme Court of Iowa heard a First Amendment overbreadth challenge in a trespass case when the defendants trapped the school superintendent in his office and destroyed school property.

State v. Williams, 238 N.W.2d 302, 306 (Iowa 1976). A defendant in Indiana who was charged with trespass onto a college campus had standing to bring an overbreadth challenge against that statute in *Grody v. State*, 278 N.E.2d 280, 281-82 (Ind. 1972). And, the Court of Appeals of Texas permitted a defendant who had repeatedly entered the University of Texas campus without permission to raise an overbreadth challenge to the state's criminal trespass charge. *Bader v. State*, 15 S.W.3d 599, 603 (Tex. Ct. App. 2000).

Like these other state court decisions, the Virginia Supreme Court's decision allowing Mr. Hicks to raise his defense to a criminal charge brought in Virginia courts is not a "radical expansion" (Pet. Br. at 14) of anything. To the contrary, it is a decision made by a state court on a procedural issue that is consistent with many other states court decisions. Even if the Commonwealth's proposed new restrictions on standing had merit, there would be no basis to introduce a new standing test relating to *federal* jurisdiction in the context of this state criminal case.

B. Standing In This Case Is A Straightforward Application Of The Overbreadth Doctrine.

Even if Virginia could not determine for itself who would have standing to raise an issue in its courts, the Virginia Supreme Court's implicit decision that Mr. Hicks had standing is still entirely justified under long-accepted principles.

As this Court has repeatedly made clear, "the Court has altered its traditional rules of standing to permit – in the

First Amendment area – 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that *his own conduct* could not be regulated by a statute drawn with the requisite narrow specificity.'" *Broadrick v. Oklahoma* 413 U.S. 601, 612 (1973) *quoting Dombroski v. Pfister*, 380 U.S. 479, 491 (1965) (emphasis added). And the purpose of allowing such standing is also clear:

> Litigants, therefore, are permitted to challenge a statute, not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

Broadrick, 413 U.S. at 612 n.3. Thus, a primary purpose of the overbreadth doctrine is to allow a statute to be tested against the First Amendment sooner rather than later, so as to prevent speech from being chilled by the mere existence of a statute.[2]

In contrast, the Commonwealth seeks to allow the chilling effect of unconstitutional statutes to continue until some expression has been directly affected by the statute. Of course, if the Commonwealth can hold off such

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[2] *See Massachusetts v. Oakes*, 491 U.S. 576, 586 (1989) (Scalia, J., concurring in part and dissenting in part) (noting chilling effect of overbroad statutes never challenged and of time elapsing before ones that are challenged are amended to come within constitutional bounds).

challenges long enough, it is likely to avoid the determination altogether since such a statute may effectively chill the expression necessary to test it. At bottom, then, the Commonwealth's proposal not only ignores, but undermines the purpose of the expanded standing rule. Thus, it is unsurprising that the Commonwealth cannot point to a single court that has even considered, much less adopted the novel and untried rule it proposes.

The effect of the proposed rule is to conflate *standing* to raise the claim with *success* on the claim. Thus, the Commonwealth essentially argues that those who might not succeed should not even be allowed to try. Indeed, it even claims that *Broadrick* envisioned this narrowing of the expanded standing that it recognized. Citing *Broadrick*, the Commonwealth claims that the "ability of a criminal defendant to *invoke* the overbreadth doctrine 'attenuates as the otherwise unprotected behavior that [the First Amendment] forbids the State to sanction moves from "pure speech" toward conduct. . . .'" Pet. Br. at 18, *quoting Broadrick*, 413 U.S. at 615 (emphasis added). But this claim seriously mischaracterizes *Broadrick*. Far from suggesting that those engaged in conduct, rather than speech, lacked the *standing* to raise the overbreadth issue, the Court quite clearly contemplated a sliding scale for weighing the *merits* of such claims, so that the farther removed from "pure speech" is the unprotected behavior at issue, the more difficult it may be to show that the statute reaches enough protected speech to justify invalidating it. The Court concluded that passage by saying, "to put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to

the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615. *See also Munson,* 467 U.S. at 958-59 (1984) (rejecting state's argument that standing should be denied because plaintiff had not shown substantial overbreadth because argument went to merits, not standing).

Significantly, this case is a criminal case, not a declaratory judgment action or other civil cause. Given that the defendant faces definite criminal penalties, there are no concerns that this case does not involve actual injury or that the interests are insufficiently concrete to assure full development of the issues. Indeed, this Court routinely permits criminal defendants to raise overbreadth claims. *See, e.g., Osborne v. Ohio*, 495 U.S. 103 (1990); *New York v. Ferber*, 458 U.S. 747 (1982); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971). Whether the Court actually finds that the statute is overbroad is another issue – it is not determinative of standing.

Here, Mr. Hicks was charged with trespassing at Whitcomb Court because he was there without permission which had been denied. But for the Housing Authority no-trespass policy, he could not have been so charged. And the Housing Authority's no-trespass policy certainly raises First Amendment issues. It required permission to be on the property for any reason, whether visiting family, communicating with residents, organizing tenant groups, leafleting, picketing, or protesting within Whitcomb Court. But the unfettered discretion that the Housing Authority manager exercised in granting or denying permission was the same whether the person sought permission for the "conduct" of visiting family, or the "speech" of leafleting.

Where a no-trespass policy is the basis for the arrest and charge of trespass, and where that policy implicates First Amendment interests, a criminal defendant has standing to raise the overbreadth of the policy in his defense.

II. THE COMMONWEALTH'S PROPOSED RESTRICTION ON STANDING TO RAISE OVERBREADTH AS A DEFENSE IN CRIMINAL CASES IS NOT JUSTIFIED.

The Commonwealth proposes that: "before a criminal defendant may be allowed to escape conviction by vindicating First Amendment rights of others, he must at least show (1) that *his own* conduct involved some sort of expressive activity, and (2) that his conduct falls within the particular prohibition that he challenges as overbroad." Pet. Br. at 25. (emphasis in original). This proposal would severely restrict current standing law and is poor policy.

A. The Proposed "Bright-Line" Rule Would Eviscerate the Overbreadth Doctrine.

The signature fact of the overbreadth doctrine is that the individual bringing the challenge does *not* have to be engaged in protected expression. *Los Angeles Police Dep't v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999); *Munson Co.*, 467 U.S. 947 (1984); *Ferber*, 485 U.S. 747; *Broadrick*, 413 U.S. 601; *Gooding*, 405 U.S. 518; *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Aptheker v. Secretary of State*, 378 U.S.

500 (1964); *NAACP v. Button*, 371 U.S. 415 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1961); *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961); *Smith v. California*, 361 U.S. 147 (1959); *Thornhill v. Alabama*, 310 U.S. 88 (1940). Nor has this Court ever required, or even suggested, that criminal defendants must be involved in some sort of expressive activity to raise overbreadth challenges. To the contrary, as discussed above, the Court has consistently noted that where conduct, rather than speech, is at issue, the claimant may have a harder time winning, not that the claimant would not have standing.[3] *Broadrick*, 413 U.S. at 615.

Allowing only those who have engaged in some expression, and only when that expression is precisely covered by the statute, to raise an overbreadth claim is to return to the general rule of Article III and non-First Amendment prudential standing requirements. Further, it would entirely vitiate the point of overbreadth standing — to allow potentially chilling statutes and policies to be tested under First Amendment analysis *before* they chill much speech.

In addition to extending the life of statutes that chill speech, the Commonwealth's "bright-line" rule would also allow civil litigants who face no penalties substantially more protection than criminal defendants who fact the loss of liberty. Certainly litigants can challenge an overly broad statute even before they engage in any protected activity or are ever charged with a crime. *See, e.g., Republican Party of Minnesota v. White*, 536 U.S. 765 (2002); *Watchtower*

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[3] *See infra* at § IB for a more detailed discussion.

Bible and Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150 (2002). Suppose the Housing Authority had a policy even the Commonwealth would admit was unconstitutional — it required permission to come onto the premises, but the policy guaranteed permission to anyone except Christian ministers who intended to pray. A civil litigant who had not been charged criminally could challenge the Housing Authority's policy. If she won, and the policy were invalidated, then the Commonwealth could not apply it to anyone. Those tried *before* such a civil suit would be convicted under the concededly unconstitutional policy, while those arrested after the suit for the very same conduct could not be convicted. Moreover, the policy would continue to chill speech. The constitutionality of a criminal conviction cannot depend on the vagaries of timing and of whether a civil litigant is willing to fund a lawsuit.

Finally, the Commonwealth has advanced not a single reason justifying its "bright-line rule" except to suppose that if the Court does not adopt it, "extreme" results will occur and government will be frustrated. But government frustration with the requirement to narrowly tailor restrictions on speech cannot justify changing the rules about who can complain about its failure to do so. In addition, the extreme results the Commonwealth posits do not turn on *standing*, they turn on fairly absurd predictions about success on the merits. For example, the Commonwealth suggests that if the Housing Authority's no-trespass policy is invalidated here, Virginia college dorms will be beset by vagrants. This brush is entirely too broad. A simple policy that prohibits non-students from trespassing *after hours* without permission for any reason, as the

Commonwealth posits, is simply a time, place or manner restriction that virtually any court would find to be consistent with the First Amendment.[4] So although the Commonwealth's vagrant would have standing to raise overbreadth, if he could articulate any protected speech the policy would restrict, he would be highly unlikely to succeed on the merits.

B. The Commonwealth's Proposed Rule Would Curtail First Amendment Freedoms.

In addition, the Commonwealth's bright-line rule would significantly undermine the purpose of the overbreadth doctrine. That doctrine permits criminal defendants to challenge the First Amendment rights of third parties to cut off the chilling effect of a statute, even when the claimant's conduct is not protected. But the Commonwealth's proposed rule, if adopted by the Court, would change all of that. It would prohibit criminal defendants from protecting the First Amendment rights of others and would therefore effectively intensify and prolong the chilling effect that this Court has long sought to prevent. As this Court observed in *Keyishian*, "[w]here statutes have an overbroad sweep . . . the hazard of loss or substantial

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[4] On the other hand, if the trespass policy also prohibited leafleting or religious discussion at any time, or required permission to do so at any time, based on unfettered discretion, that policy might indeed be subject to challenge by a vagrant (or a missionary) arrested for trespassing. Again, such a challenge would surely not succeed unless they could show substantial overbreadth relative to the legitimate sweep of the policy. If it did succeed, it would be because the policy impermissibly chills speech.

impairment of those precious rights may be critical, since those covered by the statute are bound to limit their behavior to that which is unquestionably safe." *Keyishian v. Board of Regents of the University of New York*, 385 U.S. 589, 609 (1967).

Finally, the context of this case is significant. The Housing Authority policy here further increases the housing projects' social and political isolation. The structure and location of housing projects fosters isolation. *See* Peter Nicholas, *PHA Wins $25 Million to Raze S. Phila Towers*, Philadelphia Inquirer, Aug. 31, 1998 at A1 (outlining efforts to move public housing residents closer to the rest of the community); Gilbert Jimenez, *United Center Pushes Housing West*, Chic. Sun-Times, April 10, 1996 at 10 (describing efforts to alleviate the social isolation in public housing in Chicago). The isolation of housing project residents can keep them from gainful employment, quality schools, and fulfilling religious services. In addition, residents must submit to rules and regulations more onerous than those of individuals who live outside of the project. *See HUD v. Rucker*, 535 U.S. 125 (2002) (upholding leases for housing authority residents that permit eviction if drug activity occurs in the residence without the resident's knowledge). Against this backdrop, the City of Richmond has restricted access to those neighborhoods to only those who have permission based on unfettered discretion. Though drug-dealers may be discouraged from entering the premises, so will community activists, political candidates, family members, religious representatives, broom salesmen, and the many other common, even casual, communicators of city life. The overbreadth doctrine exists to insure that anyone affected by the policy can raise the interests of these

communicators so as to insure that those lines of communication are robust.

CONCLUSION

Because Virginia courts are not required to adhere to federal standing requirements in adjudicating state criminal law cases, and because the Virginia Supreme Court properly applied this Court's overbreadth jurisprudence, the DKT Liberty Project urges this Court to affirm the Supreme Court of Virginia's holding below, and to decline the invitation of the Commonwealth to significantly restrict standing to raise overbreadth claims.

Respectfully submitted,

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